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# **THE RULES OF PROCEDURE OF THE EU COURTS – WHERE ARID RHYMES WITH FERTILE**

**A CONTEXT STATEMENT SUBMITTED TO MIDDLESEX  
UNIVERSITY IN PARTIAL FULFILMENT OF THE  
REQUIREMENTS FOR THE DEGREE OF**

**DOCTOR OF PROFESSIONAL STUDIES BY  
PUBLIC WORKS**

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*The views expressed in this research project are those of the author and do not necessarily reflect the views of the supervisory team, Middlesex University, or the examiners of this work.*

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## ABSTRACT

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Procedural rules governing judicial proceedings at the European Union (EU) judiciary help organize how access to justice takes place. These rules cover a broad spectrum ranging from how the various EU Courts are organized (i.e. their composition, their deliberation procedures and rules about the use of languages, to the rights and obligations of lawyers, the methods of service and time-limits), plus a myriad of other rules governing the written and oral phases of a variety of legal remedies, each with their own specificities and stumbling blocks.

Insiders tend to see these rules as a necessary evil, while many others perceive them as a particularly remote, arid, and boring facet of what must appear to all as an ocean - if not an abyss - of legislative rules determining much more of our daily professional and private lives than we could possibly be aware of.

This context statement seeks not only to rectify such impressions, but to critically identify a number of non-legal aspects of my profoundly legal activity as a litigator and author of an article-by-article Commentary and other public works on the rules of procedure of the EU judiciary in Luxembourg.

This critique explores the major influence that my professional career as an external counsel to many EU institutions and agencies has had upon both my public works and my successful legal practice. It reflects on how acquiring a particular approach to this work provided substantial motivation for my professional life. I elaborate on applying this reflection to my professional practice, which has included pleading over 350 cases at the EU Courts as well publishing various works on EU law.

I have given more attention than anticipated to the importance of learning foreign languages - a professional key to other cultures above and beyond other requirements for being a litigator at the EU courts. I have also reflected more than expected on the benefits of lifelong learning.

One core theme is the cross-fertilization of litigation and the publishing of legal articles. This has become a professional learning opportunity through a critical

assessment of my published work in addition to an analysis of that work's reviews. I explore (1) aspects of my major work, the Commentary, which need to be improved; (2) themes in my work which I have hitherto addressed from an exclusively legal point of view but which lend themselves to being enriched by ideas drawn from other disciplines; and (3) a number of conclusions, both for the present and the future, which I did not expect to reach when I started out on writing this critique of my own works.

## INTRODUCTION

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Today, many in the general public have contradicting views about “the EU”, to say the least. For decades, there was awareness and appreciation of the European integration’s unique achievements, which range from the creation of a community of peace and common values, to the liberalization of economic freedoms such as trade by abolishing tariffs and protectionist national restrictions.

But over time, this post-war perception has been increasingly diluted if not blurred by the Communities’ gradual metamorphosis into a political union. This evolution to what is now known as the “European Union,” which even a number of experts and outspoken friends of Europe perceive as akin to an ever faster journey to an unknown destination, has contributed to perceiving the EU as a galaxy of its own, which generates the impression of being both more and more distant and intrusive at the same time.

As for the EU judiciary in Luxembourg, it seems to intend to remain largely unknown by the public, only drawing the particular attention of the media whenever a controversial judgment is handed down. The EU judiciary then gently disappears from the radar again, into its shadowy existence, where it is always at some risk of being mixed up with the European Court of Human Rights in Strasbourg.

Not so many are aware that the EU has three judicial instances, i.e. the European Court of Justice (ECJ), which was created in 1952, the General Court (GC), which was added in 1988, and the Civil Service Tribunal of the EU (CST), created in 2005 in order to lower the GC’s workload. That said, it is only normal that relatively few have any particular knowledge of or interest in such a niche area as the rules of procedure of the EU judicial instances. This is primarily a matter for those either actively or likely to be involved in the procedures themselves. These are not numerous: for example, in 2013, a total of 691 proceedings were lodged at the ECJ, 722 at the GC and 127 at the CST.

That said, in the midst of all these mixed feelings and contrasting views no one should lose sight of the fact that quite a number of ECJ judgments concern the interpretation of aspects of substantive EU law which are relevant well beyond the parties involved in the proceedings, often affecting many, if not all, of us. For instance, the ECJ clarified the rules on the right of third-country nationals who are family members of an EU citizen to reside in the Member State of origin of that citizen<sup>1</sup>. The ECJ finding that a Spanish law requiring airlines to carry checked-in baggage without a surcharge infringes EU law is likely to be bad news for millions of tourists<sup>2</sup>. And most likely everybody within the Union is concerned with the ECJ upholding that an internet search engine operator is responsible for the processing that it carries out of personal data which appear on web pages published by third parties, meaning that every citizen enjoys the right “to be forgotten” and may, in principle, request operators of search machines to remove personal information<sup>3</sup>.

These and many other judgments result from parties to these cases having complied with all relevant rules of procedure and being aware that even the most brilliant substantive arguments are very much at risk of becoming worthless if their author misinterprets or otherwise ignores vital procedural rules. This is one of a number of reasons why I decided to write an article-by-article Commentary about the subject of EU procedural law. As the name indicates, the sequence of provisions in the various sets of procedural laws structures the contents of this Commentary. This is different than a monograph, which is structured according to subjects. My Commentary, which was published in 2013, is the first of its kind.

I have therefore chosen to center my context statement on this Commentary and to critique my work from several different angles. These include reflections on my professional life which has confirmed two important points for me: why I enjoy my professional role, and why I see my main public work,

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<sup>1</sup> Joined Cases C-456/12 and C-457/12, *O and B v Minister voor Immigratie* [2014]

<sup>2</sup> Case C-487/12, *Vueling Airlines* [2014]

<sup>3</sup> Case C-131/12, *Google Spain and Google* [2014]



the Commentary, as contributing to cultural exchange and accessibility through increasing the transparency of procedures in the European Courts as well as to improving my own professional practice.

The following is a summary of each section.

### **Section 1**

- Contextualizing my role:
  - (i) my professional role as a litigation lawyer at the EU courts, with a long track record of cases pleaded and legal articles published; followed by a description of the many coincidences which led me to choose a career as a lawyer specializing in EU law; the fundamental impact of a particular approach on my professional life.
  - (ii) important personal prerequisites of success as an EU litigator, e.g. the idea that learning foreign languages is not merely a linguistic exercise, but a key aspect of accessing the richness other cultures offer by the rewarding activity of writing legal articles and publications.

### **Section 2**

- Contextualizes the importance of the procedural rules of the EU judiciary, describes the difference between an article-by-article Commentary and a monograph, defends my choice of a commentary in relation to target audiences; and lists the learning opportunities which arise from “going public”.

### **Section 3**

- (i) This is the core of the context statement, a critical reflection on the Commentary as my main work, including an assessment of whether my book is a major work. This assessment at first appeared to present a conflict of interest and thus became a quest for objective metrics to assess the Commentary’s quality. This resulted in an in depth analysis of the research and development methodology which I deemed appropriate to the Commentary.

(ii) A critical exploration of eight new subjects which the Commentary either does not address or only marginally addresses. These arose through outside reviews and being able to stand back and reflect on the work at a distance.

#### **Section 4**

- Identifies main reviews of the Commentary, treating them as an opportunity to review ideas or critiques leading to new ideas, and implement them in the future.

#### **Section 5**

- Addresses issues I did not expect to arise when writing my context statement. This involves reflections on a multitude of questions e.g. whether professional success is the result of auto-determined decisions or something predetermined, whether there are remedies against the risk of acquiring a “tunnel-view” in my profession. This section concludes with a statement of my understanding of professional leadership in the context of publishing.

#### **Section 6**

- Reflects on future publishing and teaching projects driven and informed by what has emerged out of this critical engagement with my public works.

#### **Section 7**

- Summarizes the main reflections and findings of this context statement.

## LIST OF ACRONYMS

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ATILO	Administrative Tribunal of the International Labor Organization (Geneva)
CEOS	Conditions of Employment of Other Servants
CFI	Court of First Instance of the EU (Luxembourg)
CST	Civil Service Tribunal of the EU (Luxembourg)
ECHR	European Court of Human Rights (Strasbourg)
ECJ	European Court of Justice of the EU (Luxembourg)
ECLI	European Case Law Identifier
ECR	European Court Report
EU	European Union
GC	General Court of the EU, (Luxembourg)
GDP	Gross domestic product
ICJ	International Court of Justice (The Hague)
ILO	International Labor Organization
MEP	Member of the European Parliament
NGO	Non-governmental organization
RP	Rules of procedure
TEU	Treaty on the EU
TFEU	Treaty on the Functioning of the EU
UN	United Nations

## SECTION 1

### Personal and professional positioning in context

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#### Lawyer in EU Law

In 1990, I became a lawyer in a Brussels-based “boutique” law firm and later joined *Alber & Geiger*, a Berlin-based law firm with branch offices in Brussels and London. I am head of the EU law department in Brussels. I mostly practice as a litigator before the EU courts in Luxembourg, i.e. the ECJ, the GC and the CST, where I have pleaded some 330 cases and a further 30 cases at the Administrative Tribunal of the ILO in Geneva (see **Appendix 1**)<sup>4</sup>.

It is mainly because of the small size and geographical location of my previous law firm, and my proficiency in several languages, that I have become an external litigation counsel to a large number of EU institutions and Agencies.

In parallel, I have published numerous articles in high-level legal journals and, more recently, two books on the procedural rules before the EU Courts, including the Commentary that forms the object of the present context statement (see **Appendix 2**).

#### Litigation in EU law – a lesson of humility

My professional activity has taught me that becoming and remaining a professional in EU law requires mastering challenges that go beyond that of most other legal professions:

Firstly, working as an external counsel to EU institutions requires much more than technical work on factual and legal issues plus the quality and trustworthiness expected from any lawyer. One needs to (1) meet the high professional and linguistic expectations of EU public servants who are

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<sup>4</sup> In its 2002/2003 edition, the German handbook on law firms “JUVE” mentioned me as one of the 10 leading German names in EU litigation.

recruited through a particularly demanding selection procedure; (2) be able to interact with people from different cultures and backgrounds; and (3) be truly trustworthy - at all times - rather than be content with conveying “a sense” of trustworthiness.

Secondly, legal advice and litigation in EU law is about finding the right blend of factual, legal, strategic, and sometimes political arguments, which are then assessed by others, in two steps. The first hurdle is getting the approval of the client, who is almost always a member of an institution’s legal service and thus often a high level expert. The subsequent challenge is at the oral hearing, which takes place in front of judges who are equally highly qualified.

Thirdly, pleading before an EU judicial instance comprised of judges from different Member States requires more than speaking and understanding several languages. It also requires communicating with EU judges from sometimes very different cultural backgrounds. This requires carefully choosing one’s words and acquiring a certain restraint or awareness that the tone and content of what is said may generate different mental pictures and culturally determined reactions in those who listen.

Finally, an additional - more personal - challenge is about being ready for a lifelong learning process. By this I do not mean the obligation of continuing professional development, which applies to many other professions. Instead, the concept of lifelong learning is based on the belief that the present is a “period of intense structural and destabilizing change” to which there needs to be a response (Edwards, Ranson, Strain, 2002: 525). Thus, lifelong learning, a subject taken up by the European Commission (Hake, 1999), becomes a tool for e.g. enhancing employability (McKenzie, Wurzburg, 1997) and reducing social exclusion (Stenfors-Hayes, Griffiths, Ogunleye, 2008). But as with almost any concept, it is also criticized, e.g. by Coffield, 1999 and Crowther, 2004, who see the “learning society” as another form of social control.

This concept is important for my professional life because it helps me to stay open-minded and receptive to new challenges, which in turn tends to prevent mediocrity and a particular mental rigidity. This not only potentially benefits the quality of legal arguments in my professional life, but also helps me to keep

my feet on the ground. As much as professional success is an obvious source of personal satisfaction to me, I am aware that there is always the potential for this reducing the level of professionalism any successful career requires, - a particular risk for those who are self-employed. Being too impressed by one's own successes provides a fertile soil for complacency, becoming negligent, or turning arrogant. In the end, some lawyers even manage to become their own caricature, which some might see as helping them in remaining self-confident, while it may actually be a tangible symptom of a lack of confidence.

From my experience, those who are *truly* successful in their life tend to be both remarkably "normal" in the way they behave and will often have not only a reservoir of considerable knowledge outside their field but an attitude of openness and curiosity which not only expands but challenges their technical expertise on a regular basis.

### **Upbringing**

I was born to a French mother and a German father who were eager not only to give me a bilingual education, but also to provide me with equal access to and awareness of both cultures. When my family moved to Brussels for professional reasons, this new environment, which happens to be a crossing point between the Germanic and Latin cultures, was one that facilitated both of my cultural backgrounds to co-exist and the learning of further languages.

Over the years, this helped me to become increasingly aware of how enriching and indeed unique Europe's wide variety of coexisting cultures and mentalities is, and how much progress has been made in this part of the world since the days when "hereditary enemies" recurrently fought each other - at substantial human cost in lives and knowledge exchange.

I also gradually realized that no matter what I would do in life I would seek to remain in a multi-cultural environment. *A posteriori*, I see my career choice as being more pragmatic than idealistic since it released me from having to ever integrate into a purely national context, a potentially cumbersome challenge after so many years spent in a context where many cultures meet. By the same token, it helped me to appreciate the various national identities coexisting in Europe. I also feared that this would force me to decide whether I was more

German than French or vice-versa, which would force me to somehow lose my cross-cultural identity. Such reflections informed my conclusion that I needed to shape my future higher education and profession around these factors. But the road is rarely that straight and, in looking back, I am grateful it was not.

Enrolling in economics at the University of Bonn at the beginning of my university studies quickly proved to be the ‘wrong’ choice, but led me to discover law, to which I switched in Bonn. Perhaps something is only a ‘wrong’ choice if we do not learn from it and act on that learning.

I enjoyed studying law, but during the early eighties, the international arms race and the prospect of a Soviet westbound expansion made the future look rather uncertain. I began reflecting on whether I should emigrate, for example to Venezuela, where my sister lives. But when I was about to finish my training as a lawyer, the totally unexpected - and still surreal - fall of the Berlin Wall literally woke me up. It made me realize that the end of the Cold War could provide Europe with a fresh start and that this would mean new professional opportunities.

### **Becoming a litigator in EU law**

With no post graduate diploma in EU law on my CV, I was not sure as to whether I would qualify for any profession having to do with European integration. After five and a half years of legal studies, which was the average length at the University of Bonn, and a further three years of training as a judge<sup>5</sup>, which is the prerequisite for becoming admitted to the bar in Germany, I could not imagine spending yet further time on studying.

But this was over twenty-five years ago, when a postgraduate degree, at least for German lawyers, was an asset but not a must. At least this is what I believed. In fact, I was simply lucky that a small EU law firm in Brussels, where I had done an internship, valued my multi-lingual background and hired me.

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<sup>5</sup> “Referendarzeit”

Today's job market for lawyers is radically different. The "generalist" lawyer of the old days is no longer the standard, and the combined effects of an oversupply of qualified law students and an ever-increasing number of legal norms and special areas of law have turned specialization, and thus post graduate studies, into a *de facto* must. This has also narrowed the gap between legal education and the enormous changes the legal profession has undergone (Friedman, 2005).

Perhaps due to the limited size of the first law firm I joined, I soon got the chance to plead my first case at the ECJ. It all started with a *fait accompli*, not exactly ideal for someone with little professional experience: shortly before the oral hearing in what was a rather complex case about fiscal and social security issues, the partner, who was supposed to plead this case for the European Commission, very unexpectedly decided that I should replace him. While preparing the pleadings, I saw this as both a unique first opportunity and a potential nightmare. I quickly sensed that this was not only about thoroughly preparing the pleadings, but also having the right mental attitude. This would not be a moot court competition, but real life, i.e. pleading a complex case before highly qualified judges and facing questions, with only seconds for answering them. This, I felt, required a level of mental robustness and agility experts tend to have as a result of years of experience, while I was still at the bottom looking uphill.

This is when I remembered that as a schoolboy I had read a number of books on how to influence the human mind through "positive thinking" (Carnegie 1936, Hill, 1937, Peale, 1952). I thus promised myself that after the oral hearing I would start reflecting more thoroughly on this somewhat forgotten subject.

### **Close encounter with positive thinking**

In essence, I learned four important lessons from having a fresh look at those books.



Firstly, that the “mind” is a formidable potential source of energy and a major factor for improving and succeeding in one’s personal and professional life. Regrettably, our educational systems, no matter their level, do not currently provide any specific guidance in this respect beyond a furtive hint or two. We are taught so many things about the sciences, foreign languages, and other important subjects, and yet, in my own children’s experience as well as that of young lawyers, I do not perceive that anyone is teaching or even making students aware of how to harness the functioning of the mind and, even more importantly, how to make life-enhancing use of it beyond the more traditional use of learning matters by heart, mastering analytical reflection, etc.

That said, there seems to be, here and there, a promising evolution, as e.g. schools in Heidelberg/Germany have added the subject “Happiness” (“Glück”) to their curriculum (Herpell, 2013), possibly inspired by an initiative of the government of Bhutan, which “measures prosperity by gauging its citizens’ happiness levels, not the GDP” (Kelly, 2012).

Secondly, unless one happens to be blessed with a pre-formatted mind-set, one has a lot to gain from exploring how to take advantage of one’s mind. This requires embarking on a dialogue with oneself and thus demands readiness to become an autodidact. I see this as not only a refreshing experience, but also one where one is almost totally sovereign.

Thirdly, I quickly gained the impression that finding a suitable technique for working on mind-set would not require an in-depth understanding of human psychology, as this is something even renowned psychiatrists such as Freud and Adler and philosophers like Hegel and Kant could not even agree upon. In addition to being complex, deep philosophy and psychology hardly lent themselves to my practical purposes.

Fourthly and most importantly, I knew that I had to find a simple and sustainable method of how to take advantage of my mind for my professional and private life – and that this would become a life-long exercise.

## Implementing the theory

At the end of the day, what matters to me is not so much exploring a theoretical understanding, but effectively putting it into practice, i.e. achieving results.

As a first step, I was eager to avoid getting overwhelmed by the broad spectrum of publications on the functioning of the mind in general, and “positive”/“creative” thinking in particular. These range from academic works on the effects of mindset on behavior (e.g. Weinstein, Lyon, 1999; Armor, 2003; Gollwitzer, 2012) to books on positive thinking and success in general (e.g. Dweck, 2006 and 2012) to more thematic publications, e.g. about the link between positive thinking and growing rich (Peng, 2013) to publications focused on specific types of individuals, such as entrepreneurs (Bandura, 1977), sportsmen (Sheard, 2012), students (Adams-Schoen, 2013), or soldiers (Weiss, Davis, 2003). I was concerned – rightly or wrongly – that more contemporary authors, who are unsurprisingly numerous, may be motivated by achieving commercial success by implying they had discovered the secrets of business competitive edge and how everyone could be a ‘leader.’

I decided to concentrate on a few older publications, which carried simple and unpretentious messages, such as those of Dale Carnegie, who was born into poverty on a farm in Missouri and often quotes the Bible (Carnegie, 1936); Helene von Damm, a former Austrian steno-typist, who later became US-Ambassador (von Damm, 1987); and Norman Vincent Peale (Peale, 1952).

I became increasingly convinced that what I was looking for was a *personal* technique that would produce evidence, effective results in my professional context.

I evaluated each book using criteria such as relevance and purpose and extracted two or three iconic sentences out of each book. I complemented this by reflecting on the techniques used by advertising companies. I chose a few advertisements which I felt carried powerful messages which could be turned into a personal *motto* or what is more commonly referred to today as a mantra. For instance, I opted for a French advertisement for a cleaning product, which

said something similar to, “if it is empty, there is still plenty”<sup>6</sup>. For my positive thinking purposes I translated this into something like: I will achieve my goal, since the power of my mind is endless, regardless of what happens.

At the same time, I knew that any motivational mantra if repeated often enough could lose its ability to motivate unless supported by visualization and actively applying these mantras to resolving the various challenges I face in my profession.

By engaging in this critique, I now see that a mantra is also a technique for controlling anxiety so that energy can be used for action and solution rather than being dissipated by worrying. Successful solutions prevent and - in any event - dissolve the anxiety. Or, rather, they help transform anxiety into a source of positive energy.

In addition, in my case this anxiety reducing technique has also over time had given me more space and energy to reflect on myself and my motivations, others' motivations, and mutual influences on our thinking. This is not only fundamental to the agility and skills I need to perform effectively in my professional life as a litigator but also vital for more smoothly running of my personal and social life.

### **Multilingualism – a richer concept than simply speaking foreign languages**

A further professional prerequisite is good written and spoken command of several foreign languages, ideally English and French, which clearly dominate the world of EU institutions.

In EU litigation, French has, *de facto*, a particular importance since it is the working language of the ECJ (I will come back on this in Section 3. below). Any other language chosen by any applicant to the Court will be translated and, at the hearing, interpreted into French. Hence, it helps considerably if one has the skills to write a legal submission with an eye to translating it into French. The same is true for oral pleadings given the complexities of linguistic and

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<sup>6</sup> “quand il n’y en a plus il y en a encore”

cross-cultural interpretations. Also, clients may wish to discuss their case in French, even if the language of the case is e.g. English, or vice-versa. Switching between several languages in the context of the ECJ is very common.

That said, there is another linguistic challenge, which, from my experience, some younger lawyers tend to underestimate: that of a good command of one's *mother tongue*, in particular in writing, starting with fully mastering orthography and also the *exact* meaning of certain words. The reasons for these deficits is a subject which merits more time and research, but I have more than once had the impression that those concerned, who are so often ready to learn foreign languages, tend to be either unaware of the problem and/or immune to any constructive feedback. As I see it, even one's mother tongue is not acquired once and for all and a university degree does not come with a linguistic quality label, as some may believe.

However, the preservation of one's mother tongue is also intricately tied up with one's identity and sense of belonging to a given culture. These need to be more deeply understood and respected in life as well as in the international legal systems.

Also, somewhat unexpectedly, I discovered Butzkamm's theory that "the mother tongue is the master key to foreign languages, the tool which gives us the fastest, surest, most precise, and most complete means of accessing a foreign language" (Butzkamm, 2003: 29-30).

The coincidental advantage of growing up bilingual, which - I can confirm - makes access to further languages easier (Thordardottir, 2006), made me realize that this other dimension to languages exists. A language is a vital component of culture (Trivedi, 1978), culture being "the sum of all the learned and shared elements that characterize a societal group" (Brooks, 1964: 83). Thus, foreign languages are not merely an instrument for communicating verbally with others, but also an important key for understanding and connecting to other mentalities and cultures (Deneme, Ada, Uzun, 2011).

One of the most comprehensive texts I have read relating to culture, language and translation is “Translation Studies at the Interface of Disciplines” (Duarte et al, 2006).

In this book Chesterman suggests the value of a definition of culture proposed by Kroeber and Kluckholm (1952: 181):

“Cultures consist of patterns, explicit and implicit of and for behavior acquired and transmitted by symbols, constituting the distinctive element of human groups, including the embodiment of artefacts; the essential core of culture consists of traditional (i.e. historically derived and selected) ideas and especially their attached values. Culture systems may, on the one hand be considered products of action, on the other hand, as conditioning elements of future action.”

Chesterman then uses this definition to support a way to map the contemporary context of translation that goes beyond the strict literal translation of texts. These complexities and contexts require significant skills when conducting the everyday work of the ECJ.

“With respect to translation, this means that we can now map out the main regions of our “spatial” context as follows (in addition to the immediate textual context):

- *Cultural context* : focus on values, ideas, ideologies, traditions etc.
- *Sociological context*: focus on people (especially translators) their observable group behavior, their institutions etc
- *Cognitive context*: focus on mental processes, decision making etc

Some of the concepts we use in Translation Studies fall on borderline areas and this has perhaps contributed to the way these borders have become blurred.”

Again, it is one thing to know this *in abstracto* and another to be aware of how to integrate it into one’s professional and social life in the context of a multilingual environment:

In my experience, others’ perception matters a great deal. My colleagues and clients tend to appreciate it if I understand them not only from a purely linguistic point of view, but also with respect to their culture, traditions, and

ensuing mental pictures. Indeed, those who are aware of this and make the requisite effort will appear to others to be less confined to their own national cultural and mentality – which is a prerequisite in a multi-national professional environment such as mine.

Rosenberg very rightly points out that for a relationship with clients to be professional it should also be human (Rosenberg, 2003-2004). But in my view this is not to be misunderstood as referring to yet another marketing technique consisting of adopting some sort of human façade in order to put the client more at ease, let alone tapping people's shoulders in order to appear as the sympathetic or otherwise jovial lawyer. It is about the ability to provide high-level legal advice while remaining genuinely human and keeping some room for *non-opportunistic* humility.

This touches upon an aspect which goes well beyond this context statement, but which I see as a very important goal in life: to be able to achieve the right blend of a myriad of personal and professional factors to become and remain a decent person during what is necessarily a furtive role as a guest on our planet.

I have found my own perception also matters. It would be too functional and narrow an approach if I were to perceive foreign languages *only* as a mere linguistic means to an end, rather than as a prerequisite for discovering and accessing the added values of other cultures and mentalities. My professional spectrum is not limited to the 28 Member States of the EU, since I also advise a number of EU-funded and – based international agencies which contribute to the industrial and agricultural development of African, Caribbean and Pacific countries and thus employ nationals from these parts of the world. When communicating with staff from e.g. Senegal, St. Lucia, or Fiji, the “foreign language” aspect becomes rather marginal, as compared to the art and the pleasure of managing to bridge cultural differences.

By the same token, I have experienced that this perception leads to enthusiasm that in turn eases the learning – and indeed any – process (Peale, 1967).

At the same time, I am not worried that this could come at the price of diluting or even losing my own cultural background and roots. On the contrary, quite often this helps me become more aware of the advantages and disadvantages of

my own cultural origins. This has made me realize that no matter how convinced or proud I may be of my heritage, my own culture is not, and cannot be, an *absolute* yardstick – as tempting as such belief may be. To me, this is, beyond the purely professional and personal sphere, one of the unwritten prerequisites for preserving a community of peace and prosperity. Indeed, this is what European integration is ultimately all about – regardless of the weaknesses and sometimes outspoken errors, if not aberrations, of the integration process.

As a result, I am convinced that there is a limit to those schools of thought which advocate the idea of a *lingua franca* for the EU institutions, i.e. *English* (Seidlhofer, 2001; Canagarajah, 2007; Oltermann, 2013), even though it is promoted by the current German head of state, Joachim Gauck (Connolly, 2013). The principle of adopting any single language as an official language has serious limits.

No one seriously questions that any form of commercial or other exchange within the EU is easier if all participants speak the same language. That said, if all participants, except the native speakers, perceive such choice of a *lingua franca* as serving an obvious professional purpose, this modus of communication will hardly achieve more than that, i.e. connecting to another culture. It will be perceived as purely functional and its potential to interconnect cultures will remain limited accordingly.

Besides, as some pretend, a good command of English is no guarantee of successful *legal* communication amongst lawyers from different legal systems (Ristikivi, 2005).

Hence, communicating in several foreign languages in order to connect to other mentalities and cultures became an important complement and indeed catalyst of the more legal side of my profession. Since my reflections on language and culture became an intrinsic part of my Court work, they quite naturally became part of the spirit in which I would work on my publications in general and my Commentary in particular. Ironically, writing my Commentary in English meant taking advantage of the functional advantage of a single language, which is the one best understood on all five continents.

## **Publishing**

Working on my Commentary, closely followed by my work on this context statement, also led me to reflect on publishing in the broader context of my profession. Many lawyers have interesting insights or expertise in areas which deserve to be shared with others and yet, for a variety of reasons, they do not publish. Others undertake the effort without reaching the required threshold for being published. As a well known German law journal once told me: “You cannot imagine the number of articles we need to refuse, which is particularly delicate when written by otherwise well-known scholars.” During the many years spent on the Commentary I constantly reflected on the reasons for this.

It is my perception that the reason for publishing an article in a law journal should not be solely determined by self interest, be it as a marketing instrument, a means to enrich one’s CV, or, more prosaically, to impress oneself or others.

It is also about sharing knowledge and experience with others. This is not only a value *per se*, but is likely to have positive effects on the quality of future publications, which serves both the author and the readership.

That said, in the context of the legal profession, unlike academia, there is no professional requirement to publish. In some instances, depending upon the area of specialization, there may be little or no demand for legal publications, while on other topics there might be inflationary publishing.

The time factor is very likely to deter some from publishing. In addition, law journals like academic journals tend to carefully select what they publish, which in turn depends on factors such as the subject, the epistolary talents of the author, contemporary issues, market demands, and competing offers. That said, this might be less the case with respect to shorter notes, such as annotations of judgments or brief commentaries on a new piece of EU legislation.

I have opted for the following approach:



Apart from the obvious idea of making myself known within my profession publishing provides me with an opportunity to alternate between two complementary activities, practising and publishing. I thus perceive the seemingly cumbersome and time-consuming activity of publishing as a self-chosen piece of freedom or, less idealistically, as a self-inflicted constraint on recreational effects.

Publishing, as I see it, also contributes to “lifelong learning,” a concept that sees education as a continuing aspect of daily life so much so that quotes from noted achievers and commentators have become proverbs for the lifelong learner. These proverbs include Plato’s “The object of education is to teach us to love what is beautiful” from *The Republic*; and Einstein’s “Intellectual growth should commence at birth and cease only at death”. A more modern and well-articulated version is Lindeman’s “Orthodox education may be a preparation for life but adult education is an agitating instrumentality for changing life” (Jarvis 2009:515).

Every professional is likely to have his or her own understanding of what lifelong learning means. For many, undertaking and demonstrating continuing professional development is a condition of remaining a licensed practitioner, while for others it is self-motivated. It can take many forms; publishing, except for academics, is not a prerequisite for practice, promotion, and lifelong learning.

My challenge in this regard is similar to the one I faced concerning my “mindset”: success is likely to come from combining simplicity with sustainability. This approach has led me to publish mainly on subjects that are part of my daily work as a litigator, such as legal remedies at the EU Courts and procedural rules.

The seemingly “dry” subject of litigation has its share of ironies, as is the case in other professions: while I value procedural rules as a comparatively well-structured area of law, with little room for politics to interfere or distort (as can be the case elsewhere in EU law) I have also learned that on some – admittedly rare – occasions, intentional disregard of a procedural rule may actually improve the substantive arguments of a case.

Take, for example, Case C-424/97, *Salomone Haïm II v. Kassenärztliche Vereinigung Nordrhein-Westfalen*,<sup>7</sup> which I pleaded for the European Commission. This case was about an Italian born dentist who had to fight a long battle in order to be admitted into the profession in Germany. First, he had to challenge the local authority's refusal to recognize the dentist diploma he had obtained in Turkey, to where he had emigrated during the war for religious reasons, despite the fact that the said diploma had been recognized by Belgium. In response to the ECJ's ruling, the competent German authority accepted the diploma, but argued that admission as a dentist was nevertheless excluded because Mr. Haïm's level of spoken German would not be good enough; this constituted a "*serious deficit of the personality*" within the meaning of the relevant national law.

At the oral hearing before the ECJ, I offered commentary on the full text of the relevant German law even though the ECJ technically has no jurisdiction over interpreting the national law. This German law provides that persons who suffer from drug addiction, mental disorders or "*similarly serious deficits of the personality*" are not to be admitted to the profession. This made it clear that the German authority's interpretation of this law was manifestly unlawful under German law - which is not a matter for the ECJ to assess - and inappropriate and indeed particularly tasteless given the personal ordeals Mr. Haïm had to endure during the war. Under these circumstances, it became a personal matter for me to convince the ECJ – sitting in full Court – that the German administration had misused this national provision in order to prevent Mr. Haim from becoming a dentist in Germany.

I did not care that my argument was, strictly speaking, outside of the ECJ's jurisdiction. Given the particular circumstances of this case and the appalling and unjust manner in which this man had been treated by a national bureaucrat, what mattered above all for me was contributing to a just outcome for Mr. Haïm rather than slavishly complying with procedural rules, i.e. that the ECJ's mission is not to interpret national law. Failing to do this would have come at the price of what I feel would have been a guilty silence.

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<sup>7</sup> Judgment of the ECJ of 4.7.2000, European Court Report 2000 p. I-5123

My list of publications (see **Appendix 2**) leading up to the major public work which is the focus of this critical engagement, comprises longer articles on specific procedural subjects as well as some annotations to judgments and guest contributions, which provide a refreshing opportunity for more political reflections.

Some ten years ago I decided that a more comprehensive publishing project was required because hitherto no one had ever written a commentary on the procedural rules for proceedings at the EU Courts. However, I hesitated to undertake this project because I erroneously assumed, based on un-critiqued cultural conditioning, that the author of a law book in German needs to hold a PhD and be a professor. I corrected this assumption with some common sense - a book written for practitioners primarily requires the experience of someone who is both a practitioner and author. I would read a book written by such an author so I decided to write a book I would need and read.

One inhibition I did not have that many authors face is that of being exposed to criticisms coming both from those from different perspectives and those coming from my own context. I have always seen publication and debate as a natural extension of what a litigator appearing in public court ought to be used to and ready for in any event. Publishing articles and, in my case, two commentaries on procedural law of the EU judiciary, the first one in German, in 2008 and the second one in English, in 2013 are an extension of this.

The English book is the result of both experience gained from several hundred cases pleaded at the EU Courts and the publication of over twenty articles in legal journals.

## **SECTION 2**

### **Introduction to the “Commentary on Statute and Rules of Procedure”**

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My overall contribution to the judicial system of the EU is this Commentary, the several hundreds of cases I have pleaded at the three EU Courts, and my various other publications. The Commentary is at the center of this context statement, because it is the first of its kind and covers six decades of contribution to procedural rules by the legislature, the EU Courts, and many individuals. I have used my experience as both a litigator and an author to inform and organize my analysis. My critical engagement with and evaluation of this Commentary will improve it while giving me the opportunity to critically reflect on a number of novel themes (see Section 3 below), which are important for my own professional learning and practice.

My Commentary is addressed to both practitioners and academics, no matter their level of knowledge of EU litigation, as well as the EU legislature and judiciary and, last but not least, anyone interested in procedural matters at the EU Courts.

#### **The importance of the procedural rules of the EU judiciary and their complexity**

The purpose of any set of rules of procedure is to organize the practical modalities of access to justice, i.e. how the legal remedy chosen needs to be used during the written and oral proceedings. These rules are a codification of a broad variety of fundamental rights, such as the individual right to access to justice, to fair trial, to defence, and many other general principles of law, such as legal certainty and effective administration of justice.

Many procedural rules apply to all legal remedies, no matter the subject of the proceedings, while some specific forms of judicial actions require specific rules. As to these rules' importance, their very existence speaks for itself, since the best substantive arguments are literally worthless if a given legal remedy or

legal ground turns out to be inadmissible for failure of having complied with procedural rules such as time limits.

The legislation governing the proceedings at the EU judiciary is spread over three different levels

- The Treaty on EU (TEU) and, even more so, the Treaty on the Functioning of the EU (TFEU), which sets the fundamentals of the judicial architecture, the various legal remedies, etc., and the Statute of the ECJ (Statute), which contains the essential procedural rules;
- The rules of procedure of each judicial instance, which implement the Statute in greater detail;
- The “practice directions to the parties”, “instructions to the Registry” and further legislation autonomously adopted by the EU courts, which specify the most important rules of procedure by a multitude of binding practical provisions.

The devil is, as so often, in the detail: For instance, the “*Practice directions for parties before the General Court*” limit, as a rule, the number of pages of written submissions to fifty or less, depending upon the type of legal remedy. This prevents lawyers from drafting sometimes extraordinarily long written submissions, as happened in the pas<sup>8</sup>, quite obviously because this was opportune in terms of billing their clients, to put it mildly.

I see the current page limits as a compromise between safeguarding the rights of defence and limiting the Courts’ burden. While some practitioners believe that this would unduly restrict their rights of defence, they fail to take account the possibility to obtain derogation from this rule, which requires an amply reasoned application (Wägenbaur, 2013; idem 2014).

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<sup>8</sup> The three applications in Joined Cases T-191/98 and T-212/98 to T-214/98, *Atlantic Container a.O. v Commission* [2003] totalled 1500 pages, with over 100 files of annexes.

### **My reasons for opting for an article-by-article Commentary**

As its name suggests, this Commentary critically and comprehensively analyses *each* provision of a given piece of legislation, by following their sequence. This requires not only explaining the history, where relevant, the meaning, and the *ratio legis* of every article and its paragraphs, but also detecting possible inaccurate or misleading parts of a given provision and assessing the evolution, merits and possible shortcomings of the existing case law.

After having published some twenty-five articles in legal journals and contributed to a major German Commentary on EU competition law, I published an article-by-article commentary of some four hundred fifty pages on the procedural rules of the EU courts in 2008 (**Appendix 2**). It became and still is the first of its kind in German legal literature, as confirmed by various book reviews (**Appendix 3**).

Not long afterwards, my publisher convinced me to write an even more comprehensive book in English. This offer, which I couldn't possibly refuse, came at the price of spending another four years on that project, until the "*Court of Justice of the European Union, Commentary on Statute<sup>9</sup> and Rules of Procedure*," was published in January 2013. It comprises some nine hundred pages and is, so far, the only article-by-article Commentary of its kind in English.

The reasons why I preferred the English project to take the form of an article-by-article Commentary rather than a monograph were as follows:

There are already a number of English monographs on the EU judicial instances in general and legal remedies in particular (**Appendix 4**). When writing a monograph the author is free, to a large extent, to determine the structure and sequence of subjects, while a Commentary needs to follow the sequence of the law commented. This enables the reader to *directly* and *rapidly*

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<sup>9</sup> Which on page 3 of the Commentary is misspelled as "Statue", while the "Statute" of the ECJ is not yet that famous.

access all information available on a given provision. But it limits the room for providing an in-depth analysis of each and every aspect of a given provision.

Contrary to what one might be inclined to believe, effective use of a Commentary does not require knowledge of the contents of the law(s) commented. Readers with little or no such knowledge need to consult the contents-summary anyway. This is also the case with a monograph. The difference, though, is that a Commentary provides the user with a complete reference list of all provisions and their respective headings, unlike a monograph.

When opting for the Commentary format, I had some initial doubts, contrary to my publisher, as to which extent the potential readership would be familiar with this concept. After all, the concept of a Commentary is only well known in some European countries, such as Germany (who has a centuries-old tradition of article-by-article commentaries) (Kästle/Jansen, 2014), Austria, Switzerland and, to a far lesser extent, France and Belgium. Moreover, in the Anglo-American legal tradition the term “Commentary” has a different meaning, e.g. the famous 18<sup>th</sup>-century treatise on the common law of England by Blackstone (Prest, 2014).

In the end, my slight concerns were unfounded, since EU law is clearly an emanation of the continental law tradition and, as a result, a number of article-by-article commentaries have already been published, e.g. on EU copyright law (Stamatoudi/Torremans, 2014) and the EU Charter of Fundamental Rights (Peers, Hervey, Kenner, Ward, 2014). The fact that numerous libraries, such as the British Library<sup>10</sup> or the US Library of Congress<sup>11</sup>, and even more importantly universities from the five continents, including Oxford, Cambridge, the LSE, Harvard, Stanford, Yale, McGill, Hong Kong, Melbourne, South Africa, etc., have bought the Commentary strongly suggests that the book’s format is not a deterrent, but instead filled a gap. Subsequent book reviews, such as Carrick’s (the Commentary was “long overdue”) and Picod’s (the Commentary was “awaited”) confirmed this (see Section 4 below).

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<sup>10</sup> <http://bnb.data.bl.uk/doc/resource/015664534>

<sup>11</sup> [www.loc.gov](http://www.loc.gov)

### **The size of the Commentary**

The size of a Commentary can be anything between a “pocket” version, which is hardly more than a brief explanation of each article, to a publication comprised of two or more volumes.

All I knew when beginning my project is that my English commentary needed to be much thicker than my German commentary, where the upper page-limit set by the publisher turned out to be too low, especially since the ECJ’s rules of procedure were now much more numerous. In the absence of any specification by the publisher as to the page numbers I decided that the English book should be twice as long as the German one and in a bigger format.

### **The target audience**

I was very much determined to meet the expectations and needs of as many categories of potential readers as possible (as explained in greater detail in Section 3 below):

Potential and actual litigators in EU law<sup>12</sup> are, by definition, important readers of my Commentary, since their case, no matter the merit of their arguments, needs to comply with applicable rules of procedure. Normally, any practitioner, regardless of his or her level of experience, must receive the maximum relevant information possible. Ideally, this will answer all his or her questions as quickly and effortlessly as possible. These needs vary according to each legal remedy and individual article concerned.

The EU Courts are a further important addressee, which the ECJ confirmed by buying fifteen copies of the Commentary for its library, of which eight are on “permanent loan” in Judges’ cabinets (**Appendix 5**). This indicates that the judiciary uses the Commentary for its daily work.

Since the ECJ also interacts with the EU legislature, it may use the Commentary when elaborating amendments to the Statute of the ECJ and the

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<sup>12</sup> For grammatical convenience, I will use the personal pronoun „he“ generically to stand for all practitioners and stakeholders



Rules of Procedure before submitting those amendments to the Council of the EU. In 2012, i.e. even before my Commentary was published, the CST asked me to provide suggestions as to which provisions of its rules of procedure should be amended (**Appendix 6**). Subsequently, the CST incorporated a number of these suggestions into its new rules of procedure, which came into effect on 1 October 2014 (see Section 3 below).

Scholars may use the Commentary as a source of inspiration for publication projects, as Carrick rightly finds in the concluding remarks of his book review (**Appendix 7**). Additionally, this is a potentially useful tool for law students with an interest in EU litigation<sup>13</sup>.

### **The Commentary at the centre of the context statement**

I learned about the existence of the Doctorate in Professional Studies Program at Middlesex University and immediately felt that this was likely to open windows towards the contemplation of legal issues from new angles or a non-conventional exploration of something as conventional as the EU rules of procedure. I was particularly attracted by this opportunity to switch from the role of author to one of critical assessor of my own work, an experience that goes well beyond the level of self-critical attitude that both the daily practice and publishing requires.

Working on this context statement also provides me with an opportunity to step out of the “tunnel vision” which traps many if not most lawyers into believing that one should only discuss legal subjects using legal arguments.

Ultimately this process, as I understand it, requires one to realize that becoming - and remaining - a professional in one’s own area of specialization is not just a matter of maximizing relevant knowledge, experience and know-how, as one would expect. It is also about acquiring the ability to take a critical look at one’s own work while understanding –and remaining aware - that the horizon is not limited to one’s own field of experience.

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<sup>13</sup> See e.g. the reading list of Prof. Dr. Josef Azizi (University of Innsbruck), former Judge at the GC, [www.uibk.ac.at/.../selbststaendige-publikationen](http://www.uibk.ac.at/.../selbststaendige-publikationen)

In theory, I knew this, but the context statement turned it into a real life experience.

## SECTION 3

### The main work

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#### Is the commentary a major work?

No legal journal would publish a lawyer's case commentary with respect to a judgment he was involved in, let alone a review of his own book, given the obvious risk of a conflict of interest. Nevertheless, this is precisely one of the challenges I undertake in this context statement. I look forward to verifying whether and to which extent I am able to distance myself sufficiently so as to judge my work as objectively as possible.

A first step in this direction is looking at other publications on the same subject. Since the creation of the ECJ in 1952, relatively few monographs on the judicial system of the EU as a whole have been published (**Appendix 4**), while there are a number of books and many articles in legal journals on the more iconic legal remedies before the EU courts (**Appendix 8**).

As already mentioned above, in 2008 my German commentary became the first of its kind to cover the Statute of the ECJ *and* the rules of procedure of the three judicial instances of the EU. My Commentary in English became the next *première* in 2013, the first work of its kind in English.

It is quite surprising that after a full half century of existence of the ECJ and twenty-five years after the creation of the now GC, no such Commentary has been published in English, even though it was "*long overdue*", as Carrick rightly points out. While a few members of the EU judiciary have published commentaries, they cover a much broader area, such as the EU-Treaties (Advocates-General Léger and Lenz). Others have written monographs on procedural law (Judge Lenaerts and former Référendaire Dausès) (**Appendix 4**).

None of them opted for a Commentary on procedural law, even though they had at their disposal the archives of the ECJ and relevant human resources.

That said, the fact that my Commentary is so far the only one of its kind might set a certain standard, at least with respect to potential competing authors. But this alone does not necessarily turn it into a major work, given the absent comparison with other works.

Assessing whether my Commentary is a major work requires determining whether it meets the following challenges:

**First challenge: critique of high quality legislation**

Over time, the legislature has improved the Statute of the ECJ and, in particular, its rules of procedure, with the help of what must have been an armada of high level legal experts from both within the ECJ, i.e. the institution proposing legislative changes, and from those at the receiving end of the proposals, i.e. the Council, which is the assembly of the Member States. A number of these amendments consisted of integrating case law, while others improved the wording or structure of existing provisions or removed *lacunae* or inaccuracies.

Given the overall high quality of that legislation, reflecting on possible improvements and constructive criticism took me a considerable amount of time. This was made more difficult because I am the single author of this commentary. My efforts seem to have been fruitful, however, since a number of legislative changes I advocate in my Commentary are now contained in the CST's new procedural rules<sup>14</sup> and the GC's currently pending proposal for a recast of its rules of procedure<sup>15</sup>:

<b>Subject</b>	<b>Previous / current provision</b>	<b>Commentary</b>	<b>New provision / pending proposal</b>
<b>Court costs (CST)</b>	Art. 94 (a) RP CST Rule: no Court costs Exception: misuse of procedure, maximum of <b>2.000 €</b>	Explains need for increase to between <b>7.000 €</b> and <b>10.000 €</b> in case of misuse	Art. 108 RP CST: maximum <b>8.000 €</b> in case of misuse
<b>Time-limit (for lodging formal plea of</b>	Art. 78 RP CST: Within <b>1 month</b> of service of the	Explains why one month is too short and	Art. 83 RP CST: Time-limit of 1 month dropped, thus <b>2</b>

<sup>14</sup> Which came into force on 1 October 2014

<sup>15</sup> Dated 14 March 2014

inadmissibility)	application	advocates <b>2 months</b>	<b>months</b> applies (as for statements of defence)
<b>Court costs (GC)</b>	Art. 90 RP GC: <b>None</b> , only avoidable costs need to be refunded	Advocates extension to cases of <b>manifest misuse</b> of GC's time and resources	Art. 139 (a) of pending proposal of RP GC: "where the action is manifestly an <b>abuse of process</b> "
<b>Contents of an application (GC)</b>	Current Art. 44 (1) c) RP GC: <b>Not very precise</b>	Stresses need for making provision <b>more specific</b>	Art. 76 (d) of pending proposal of RP GC: makes provision <b>more specific</b>
<b>Contents of an application at the CST</b>	Art. 35 RP CST: "needs to <b>contain</b> the pleas in law and the arguments of fact and law relied on"	Stresses the need to set out legal grounds and arguments "in a <b>detailed manner</b> within the application"	Art. 50 (1) (e) RP CST requires a " <b>clear summary</b> of the facts" and a " <b>separate, precise and structured summary</b> of the pleas in law and arguments"
<b>Independence of a Judge</b>	Article 18 Statute ECJ: <b>No</b> implementing provision in the rules of procedure	Stressing that there is " <b>little or no guidance</b> for parties confronted with the question of bias"	Art. 16 of pending proposal of RP GC: <b>specifies</b> the procedure in Art. 18 Statute ECJ "in the interest of <b>transparency</b> "

### **Second challenge: spotting linguistic inaccuracies**

For the purposes of my Commentary I also scrutinized the legislation for linguistic inaccuracies. But with currently twenty-four official, equally authentic languages, I could only compare five major linguistic versions, i.e. English, French and German, which are the most important languages of the EU<sup>16</sup>, as well as Spanish and Dutch.

The German language version of the rules of procedure contained the most outdated or otherwise unfortunate terms. For instance, the German term for "Deputy Registrar" is "*Hilfskanzler*," which means something like "Auxiliary Registrar". Not only does this have a slightly negative connotation, but it is also not in line with the importance of the duties incumbent upon the Deputy Registrar. In the recast of its rules of procedure the ECJ did change the title from "*Hilfskanzler*" to "*Stellvertretender Kanzler*," i.e. Deputy Registrar.

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<sup>16</sup> Opinion of Advocate-General Kokott in Case C-566/10 P, *Italy v Commission*

By contrast, the German version of the GC's current rules of procedure<sup>17</sup> still use the old unfortunate expression. However, its currently pending proposal<sup>18</sup>, suggests "*Beigeordneter Kanzler*", meaning something like an Assistant Registrar.

As in my German book, while drafting my Commentary, I also criticized the use of the term "*Armenrecht*" which hitherto was contained within the supplementary rules of procedure of the ECJ. This is an outdated term for "legal aid" and literally means "rights of the poor". I had to drop this point, however, because it turned out that the German version of the new rules of procedure and supplementary rules of the ECJ no longer contained this expression.

At this stage, given the high linguistic quality of the EU procedural rules there are *quasi* no linguistic inaccuracies left.

By contrast, the rules of procedure of the Administrative Tribunal of the ILO, apart from being remarkably succinct, still require some linguistic refining. For example, the English language version of the rules contain the expression "*irreceivable*", which is a literal translation of the French term "*irrecevable*." The accurate English term is "inadmissible". Also, the final provision is even more unfortunately worded: "*The present Statute shall remain in force during the pleasure [sic] of the General Conference of ...*" An entertaining congregation, it would seem.

### **Third challenge: assessing the case law**

As a first step I used the "digest of the case-law" published on the ECJ's website which is perhaps *the* major data base for ECJ judgments, containing extracts of the case law of all three judicial instances. The digest is structured according to the EU-Treaties and comprises a substantive chapter on legal remedies and procedural rules.

This database is certainly a precious source of information, even though it is not up to date in every respect and comes at the price of two linguistic hurdles:

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<sup>17</sup> Article 21: "Hilfskanzler"

<sup>18</sup> Article 33: "Beigeordneter Kanzler"

Firstly, the extracts of case law are only available in French, i.e. the working language of the EU Courts. This excludes quite a number of potential users, who will neither be able to find the parts they are interested in, nor, tragically, be able to subsequently access the links to other linguistic versions they contain.

Secondly, only the ECJ's judgments are systematically available in *all* official languages, unlike judgments of the GC and especially the CST.

Costs and limited demand are good reasons for not translating all judgments relating to less important areas, such as Staff cases, into twenty-four languages. But it would be feasible to provide the “digest of the case law” in e.g. English, French, and German, which would make it substantially more user-friendly. Besides, this would also be within the spirit of the European Commission's “Europe for Citizens Programme”, which is *inter alia* about “respecting and promoting linguistic diversity”<sup>19</sup>.

The second step, which was to analyze and critically comment upon the case law, became a major challenge, as I not only needed to compile and read the various lines of case-law relating *specifically* to procedural issues, but also to assess and comment upon these issues' evolution over time, something which had to be done for each of the three judicial instances.

It would make the life of all interested readers easier if the EU judiciary would expressly indicate whenever it departs from its previous line of jurisprudence, even though such changes remain - reassuringly - rare. This is a practice applied by e.g. the German Supreme Court<sup>20</sup>.

#### **Fourth challenge: being a single author- benefits and drawbacks**

Did the writing of the Commentary as a single author in any way contribute to making it a major work? Certainly not *ipso facto*.

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<sup>19</sup> [http://ec.europa.eu/citizenship/europe-for-citizens-programme/index\\_en.htm](http://ec.europa.eu/citizenship/europe-for-citizens-programme/index_en.htm)

<sup>20</sup> BGH, judgments of 9 October 1996 – Case 3 StR 220/96, BGH St 42, 255, 259 et seq. and of 3rd July 2014, Case Az. I ZR 28/11

However, my single-author approach did enable me to publish my book a few weeks after the ECJ's new rules of procedure came into force, meaning that at the time of publication my book could not possibly have been more up to date, as stressed in nearly all book reviews (**Appendix 7**). Also, when I contributed to a commentary on EU competition law (**Appendix 2**), I saw that co-authors failing to honor their deadlines delayed the publication for about two years, such that earlier contributors had to update their submissions. I had no interest in the same thing happening when writing my Commentary. Besides, there are simply not many EU lawyers who have extensive experience in both litigation and publishing; who have good knowledge of English, French, and German; *and* who are willing to invest a considerable amount of energy over a long period of time.

The price of this approach is that I alone had to supply the motivation, energy and time it took to write the Commentary and reconcile this with a busy professional agenda and my family life.

It was only after a brief period of mental “hangover” following the publication of the Commentary that I realised that what made me persevere was not only applied positive thinking (see Section 1 above), but a genuine passion for this seemingly arid, if not bone-dry, subject called the Statute of the ECJ and the rules of procedure of the EU Courts.

Thus, in the course of writing this context statement, I came to the conclusion that my Commentary is a major work. This view is shared by e.g. Augustyniak, in his book review of June 2014 (see Section 4 below): “Bertrand Wägenbaur undoubtedly belongs to a group of excellent lawyers, showing a deep knowledge of the nuances and procedural complexities facing the ECJ...”. In his concluding remarks Augustyniak then notes: “One has to appreciate the author’s commitment especially as the presented work has pioneering character, taking into account such exhaustive discussion of procedural acts. It can therefore be said that B.Wägenbaur has resolved this task, and the work is worthy of recommendation in every respect.”



## **My understanding of research and development methodologies that may be appropriate to my Commentary**

### **Research methodology**

My research methodology consisted of discovering and implementing the most efficient way to find all relevant facts and materials to write my Commentary.

The list of “classical” sources to be explored comprised the relevant case-law and case commentaries, where available, and, to some limited extent only, legal publications, including some press articles, previous and pending EU legislation regarding procedural rules, and my own experience as a litigator. I also took account of the procedural rules of some international judicial bodies.

### ***Case-law***

A number of procedural rules apply to all judicial proceedings, while others are specific to a given legal remedy, such as appeals or referrals for preliminary rulings or interventions. This turns *all* judgments or orders of the three EU courts into potential sources of procedural case law. This case law includes the way a given procedural rule and/or general principle of law is interpreted, to the way the Judges apply a given legal principle or line of case law to the facts, to the way they address factual and/or legal situations when the procedural rules are silent.

It would have saved me considerable time if the ECJ, the source of this case law, operated a central and exhaustive database comprising *all* judgments and orders. Instead, the sources are scattered. I primarily relied on the “European Court Reports” (hereafter: ECR)<sup>21</sup>, and the ECJ’s electronic “digest of the case-law”, the “search form” and the “numerical access to cases.”

The ECR does not contain “all”<sup>22</sup>, but only the most important judgments. My methodology, as I had defined it, required me to verify *each and every one* of the – many hundreds – of volumes “by hand” because the index of each volume and the first page of each judgment/order merely contain a few

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<sup>21</sup> Which recently ceased to be published, due to financial constraints.

<sup>22</sup> Unlike what is indicated on the website of a famous UK law faculty, <http://www.law.ox.ac.uk/lrsp/print/eu.php#ECR>

keywords indicating the subject concerned. These keywords only refer to procedural issues exceptionally, if they are at the heart of the proceedings. Thus, I had to manually go through each judgment and locate procedural issues.

The “digest of the case law” provides free access to, *inter alia*, extracts of case law regarding the various general principles of law, legal remedies, and rules of procedure. Each of these main categories comprises sub-categories, each leading to further sub-categories, which, taken altogether, constitute a very large amount of information. Accessing and screening every bit of case law contained therein produced some duplicate work with the aforementioned exploration of the ECR. But it provided me with a welcome opportunity to complement my previous findings and, even more importantly, to verify whether I had well understood all the nuances of the case law contained in the ECR.

I also extensively used the ECJ’s “search form,” which was improved some years ago. It enables the user to find relevant judgments and orders by either using words or keywords, the name of the parties, etc., or by accessing judgments and orders, both published and unpublished, which are listed according to the legal remedy or category of procedure concerned (e.g. appeal, legal aid, intervention, etc.).

Research by search term provides endless opportunities for some types of research, such as discovering principles or concepts that are of some importance but where only little case-law exists, such as the concept of judicial bias.

But what seemed so easy and convenient turned out to be cumbersome. I had to carry out the research using keywords in both English, i.e. the language of the Commentary, and French. Not all of the GC’s judgments are available in English, while the CST’s judgments are mainly available in French and the language of the proceedings, which is only very rarely English. The latter is almost tragic, since the CST’s judgments that are a particularly fertile source of procedure-related case-law. This gap is due to the sometimes extraordinary way in which EU lawyers either disregard the ECJ’s procedural rules or

attempt to interpret them in the light of principles drawn from their respective national backgrounds.

In sum, this case-law research produced much more than a mere quantitative compilation to be mechanically inserted into the Commentary. It enabled me to spot and analyze any possible evolution of procedural case law in any of the three judicial instances, to compare this development across instances whenever their procedural rules were either identical or very similar, and to thereby discover aspects that I hitherto had ignored.

### ***Pending legislative proposals***

Normally, pending legislative proposals are not among the subjects to be discussed in a commentary. I included them only when I deemed it necessary by balancing the - unpredictable - agenda of the legislator, the importance of the changes proposed and the probability of such proposal being adopted with only few or no changes. Including less certain chances risks commenting on a hypothetical basis, something quite unthinkable in my profession in general and in law books in particular.

I did not expect this to become a problem, until March 2011, well into the second year of working on the Commentary, when the ECJ submitted a major legislative proposal to the Council of the EU. The first part contained only some, albeit important, amendments to the Statute of the ECJ. But the second part turned out to be a complete recast of the ECJ's rules of procedure. The hitherto one hundred and twenty five articles became two hundred and fifteen provisions, for a variety of reasons. Over the past decades, certain judicial procedures, such as referrals for preliminary ruling and appeals of GC judgments, had become increasingly important, while actions for annulment lost much of their initial significance. Moreover, the ECJ needed to remove certain ambiguities or even *lacunae* and make the rules of procedure more user-friendly by splitting a number of voluminous provisions into several articles.

I was facing an unsolicited dilemma:

On the one hand, there was a reasonable probability that the Council would not substantially amend but rather rubber stamp the ECJ's proposal about the rules of procedure. After all, this rule revision cannot be compared to the far more complex and unpredictable classical legislative process concerning EU Regulations or Directives, which involve the European Commission, Parliament, and Council. Thus, there was a good chance that the proposal would ultimately be accepted with no major changes, even though this was a major recast.

But on the other hand, it was foreseeable that the financial and political implications of amending the Statute to increase the number of Judges at the GC from 27 to 39 would trigger long discussions and risked fierce opposition within the Council. Indeed, this issue is not yet over, as will be seen below.

The biggest risk to the satisfactory completion of my Commentary was the possibility that the proposed changes to the rules of procedure would remain pending as long as the legislature had not agreed on whether to increase the number of Judges. This is exactly what happened, putting me in an un-ideal predicament as to which set of rules of procedure of the ECJ I should ultimately comment upon.

What was the right method? To wait and see? To carry on with the work I had already done on the now-outdated rules of procedure? Or to start commenting on the pending proposal at the risk of substantial energies being ultimately wasted?

I decided to speculate on the Council ultimately separating the issues, i.e. adopting the rules of procedure, while continuing to debate the increase in GC Judges. In the end, the Council separated the issues after two long years, when it adopted the ECJ's new rules of procedure with only very minor amendments.

My speculation paid off, and a few weeks later my Commentary was published.

### ***Procedural rules and related case law of other international courts and Member States***

My research methodology would have been incomplete had I not compared the rules of procedure of the EU judiciary with and those of a number of international courts, e.g. with respect to time-limits, contents of written submissions, judicial bias, and other rules likely to be common to all international Courts. The courts I considered included the European Court of Human Rights (Strasbourg), which has jurisdiction over the European Convention on Human Rights, and the Administrative Tribunal of the ILO (Geneva), which hears staff cases from various international organizations and the International Court of Justice (The Hague), which has, *inter alia*, jurisdiction in contentious cases between States and gives advisory opinions at the request of the organs of the UN.

### ***Monographs and articles in legal journals***

I deliberately opted for a restrained approach in my use of legal publications on the EU judiciary for several reasons:

While there is now a large quantity of legal publications on judicial protection at the EU court, articles addressing specific aspects of the rules of procedure remain rare.

Also, in their judgments the EU Courts never refer to legal publications, which also tends to be the case in Member State courts. Thus, whether and to which extent legal publications actually influence the EU judiciary remains unclear. In the case of the ECJ, there may be a very *indirect* influence, since Advocate-Generals often refer to legal scholarship in their Opinions. As an example, between 2010 and 2012 my German commentary has been quoted by four Advocate Generals (**Appendix 9**), which seems to indicate that my German commentary is influential legal scholarship.

## **Development methodologies**

A further challenge was how best to use the vast quantities of information I had collected. Since I was not drafting the Commentary for myself but for any interested reader regardless of background, knowledge level, or reason for consulting my book, it was very important to take into account the expectations and needs of various target audiences (see Section 2 above).

### ***The multiple expectations of practitioners***

In my view, practitioners are my book's primary target group. Practitioners expect more than a conventional analysis of each and every article. Instead, I needed to anticipate their myriad practical questions, which are at least as important to them.

For instance, any lawyer seeking to obtain the green light for an “expedited procedure”<sup>23</sup> for his client needs to know beforehand how much time he is likely to save with such a procedure. In certain proceedings, regarding e.g. merger control decisions, this time factor is crucial.

With this in mind I inserted two tables indicating (1) the average duration of proceedings, and (2) the duration of expedited proceedings, detailed according to the various legal areas, such as competition, state aid, environment, etc.<sup>24</sup>. Since the GC does not publish the latter figures I had to find all orders where the GC had accepted a request for an “expedited procedure” and calculate the relevant time delays. This relieves the practitioner from undertaking such cumbersome exercises at a time when he is likely under time pressure anyway.

Similarly, I compiled the relevant figures on the average duration of expedited proceedings and urgent referrals for preliminary rulings at the ECJ<sup>25</sup>.

I had to do the same for taxation of costs. For many years this procedure remained rather obscure, since the resulting orders were often poorly reasoned and unpublished (Wägenbaur, 1997). Since then, transparency and technology

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<sup>23</sup> Commentary, Article 76a RP GC.

<sup>24</sup> In his book review *Picod* welcomes the various tables inserted into the Commentary.

<sup>25</sup> Commentary, pp. 202-203

have improved and many orders are now published. But this does not answer what is often the very first question of practitioners, i.e. which approximate fraction of fees and costs the other party will need to reimburse in the end. This matters for negotiations between the parties as well as any subsequent taxation proceedings at Court.

I thus extracted the relevant costs figures from the abundant case law, i.e. the amount claimed by one party, proposed by the other side, and taxed by the judicial body concerned, and inserted them in tables, according to the various areas of EU concerned<sup>26</sup>.

This saves considerable time for the reader and has never been done before in an English publication.

### ***Complementing missing case-law***

‘Development methodology,’ as I define it, also includes providing guidance about those provisions where there is hardly any case-law and/or authoritative publications. One example is Article 18 of the Statute of the ECJ that is about Judges having a conflict of interest. This provision remains surprisingly silent as to *when* there is a conflict of interest, and there is hardly any case law on this subject. It was clear that the practitioners expected me to not only explain the three or four relevant orders that I filtered out of an ocean of case-law.

Thus I screened the relevant case law of some international jurisdictions and Member States and created three categories, i.e. bias, absence of bias, and borderline cases in relation to Judges and Advocates General. This required reflecting on a variety of situations likely to occur in judges’ professional and private spheres, past or present.

I believe I had good reasons to take press articles into account for this subject. These articles e.g. criticized the fact that an Advocate General was giving his Opinion on whether medicinal products for human use should still be exclusively sold by pharmacies or via the internet, while his wife and daughter were pharmacists.

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<sup>26</sup> Commentary, pp. 757-759

In my Commentary<sup>27</sup>, I also pointed out that Article 18 is summary in nature. The GC shares this view, since it has now proposed adding an implementing provision to its rules of procedure, which details the procedure in case of conflicts of interest<sup>28</sup>.

### *Discussing legislative choices*

My Commentary would have been incomplete had I not reflected on the merits of the then still pending legislative proposals, such as the increase of the number of Judges at the GC<sup>29</sup>:

There is an uncontested need to reduce the GC's workload and thereby the average duration of proceedings in such important areas as competition, merger control, state aid, anti-dumping, agricultural policy, etc. given the applicants' right to have their cases adjudicated "within a reasonable time" (Article 47 of the Charter of Fundamental Rights of the EU). My commentary points out that this proposal would in all likelihood result in a long dispute among Member States as to *who* would be entitled to nominate *two* Judges at the GC<sup>30</sup>. Regrettably, this is exactly what happened and after three years of fierce discussion the Council rejected the proposal.

Since I saw this coming, I reflected on possible alternatives<sup>31</sup>, such as the creation of a further specialized Tribunal, e.g. for the intellectual and industrial property cases<sup>32</sup>, as was done in 2005 for civil service cases via the creation of the CST. But the ECJ did not submit any such or other "Plan B" to the Council.

In November 2014, the ECJ proposed that *each* Member State nominate *two* Judges at the GC, while the CST would be abolished and its jurisdiction taken over by the GC. This appears to be a seemingly astute attempt to break the deadlock, since all Member States would be treated equally, thus taking away one major reason of discord. But the financial impact of this proposal will

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<sup>27</sup> P. 38

<sup>28</sup> Article 16 of its draft rules of procedure

<sup>29</sup> Commentary, pp.141-142

<sup>30</sup> Commentary, p.141-142

<sup>31</sup> Commentary, pp. 141-142

<sup>32</sup> Against decisions of the Office for Harmonization in the Internal Market



hardly please the main contributors to the EU budget. The perspective of a further deadlock looms. This is not helped by the fact that the ECJ again did not submit any alternative solution.

### *Discussing the merits of case-law*

All readers, especially practitioners, may be interested in a critical contemplation of the case law regarding procedural rules. This will likely provide some with arguments in a given case, others with a subject for a publication (e.g. Wägenbaur, 1995; idem 1996; idem, 2003; idem 2007) and the Judges with some feedback. For instance, I critically commented<sup>33</sup> upon an order of the CST in a taxation matter, where the Judges, sitting in full Court, radically departed from the well-established case law of the ECJ and the GC on the right of all EU institutions to be assisted by an external lawyer<sup>34</sup>. The CST held<sup>35</sup> that as a rule, the institution needs to justify the reasons as to why it involved an external lawyer, as it otherwise would not be entitled to claim that lawyer's fees from the other side if the latter needs to bear the costs. An order such as this CST order may not be appealed.

I explained the reasons why this breaches Art. 19 (1) Statute of the ECJ in my Commentary. In an order regarding taxation delivered in March 2014, the GC argued along the very same lines as I did<sup>36</sup>.

Whether my views influenced the contents of the GC's order in any way is a matter for speculation, but it illustrates that my arguments were well founded and thus contributed to the development of knowledge.

### *A communication exercise*

A further cornerstone of my development methodology is the manner in which I communicate information to the reader.

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<sup>33</sup> Commentary, pages 741-742

<sup>34</sup> Article 19 Statute ECJ

<sup>35</sup> Case F-55/08, *De Nicola v EIB* [2011], paragraphs 24 et seq.

<sup>36</sup> Case T- 126/11 P-DEP, *Marcuccio v Commission* [2014]

It was essential for me to draft the Commentary so that various users enjoy and look forward to using it. I therefore opted for a simple and self-explanatory writing style. This also reflects the fact that many readers are swamped with reading material anyway and thus do not want my Commentary – and presumably any other legal publication – to be written in a complex, arid, or otherwise constipated manner.

The yardstick is not whether *I* understand my prose, but whether every reader does. Achieving this remains a lifelong and rewarding challenge.

A good writing and communication style is obviously an essential skill. During my legal studies there were no such courses, unlike in some UK and North American universities, where the concept of “legal writing” was extended to legal methodology.

Thus, I had to learn things the hard way. While drafting the statement of defense in one of my first Court cases, the agent of the defendant, a major EU institution, agreed with the line of defense, but then told me “you need to write so that a cleaning lady understands”. After a quick smile at the idea of a congregation of cleaning personnel actually hearing the case, I was convinced: I had to get rid of the exam-distorted writing “style” which years of German university had inflicted upon me and adopt a simple and yet rich writing style.

This became a *Leitmotif* for my professional activity; especially since EU institutions expect their external counsels to reach the same high-level writing skills as themselves. I am convinced that these specific requirements helped me to shape a writing style for my legal publications, including the Commentary.

### **Limits to any methodology**

Legislation is, by definition, abstract and general. Thus no author will ever be able to anticipate each and every factual situation likely to be relevant under a given provision.

But many readers of my Commentary nevertheless expect me to precisely do that, to the greatest extent possible. This became a challenge in itself, which my long experience as a litigator prepared me to begin addressing. But the next

step was then to try to anticipate as many factual situations which are (1) likely to occur in real life, (2) potentially relevant under the provision in question, and (3) where there is not yet any or only scarce relevant case-law.

Experience helps to determine appropriate methodology for this undertaking, but one must also employ abstract *and* creative reflection. I believe that such creativity has less to do with a given methodology than with the ability to think or imagine outside mainstream methods. At the same time, such creative thinking needs to be kept within reasonable limits, for reasons of time and because a number of lawyers, depending on the subject, will literally play around with procedural rules in a surrealistic, unforeseeable manner. Anticipating such odd arguments is not of any interest to the majority of lawyers who make reasonable arguments before the Court.

The reader certainly cannot expect a commentary to give guidance as to how best to *circumvent* a given procedural rule, even though some practitioners might be keen to learn just that. For instance, regarding Article 19 (3) Statute ECJ, which provides that individuals and legal persons *must* be represented by a lawyer, it was not my role to indicate the practical - and money saving - way out, which is that the party should draft the written submissions himself and then simply pay a lawyer for using his letterhead and signing the document<sup>37</sup>.

## Novel themes

In my Commentary I criticize a number of legislative choices and subjects, although this critique was necessarily confined to *legal* arguments, in line with what the readership would expect from a legal publication. This present context statement provides me with an opportunity to elaborate on a number of these issues, while addressing others not covered before using arguments drawn from other disciplines. These are set out below:

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<sup>37</sup> To be kept within reasonable limits, though, as paragraph 6 of the Order of 11.12.2014, Case F-114/14, *Marcuccio v Commission*, illustrates, where the CST expressed its doubts as to whether the application had been drafted by a lawyer.

### **First theme: The ECJ's working language, a relic of the past?**

As a rule, those who go to Court may choose one of the twenty-four official languages of the EU. It is less known, however, that internally all three judicial instances of the EU use a single working language: French.

The latter is an unwritten rule that dates back to the days of the six founding Member States. At the time, three of the founders have French among their official languages, while the other Member States' languages, i.e. Dutch, German, and Italian, had no comparable weight. This *status quo* was then automatically extended, in 1988, to the then CFI, now known as the GC, and, in 2004, to the CST. As a result, French remained the judiciary's internal working language throughout the various waves of enlargements, which saw a total of twenty-two Member States joining what has now become the European Union. The first three, including the UK, joined in 1973 and the most recent new member, Croatia, in 2013.

### ***Is French still the common denominator?***

The little-explored question is whether this working language is still appropriate in a Union of twenty-eight Member States. Are *all* Judges able to deliberate in French? This question is primarily relevant for the ECJ and the GC, which currently have twenty-eight Judges each, more than for the CST, which only has seven Judges and where French remains the dominant language of the proceedings.

There is circumstantial evidence that French is *not* the common denominator among the Judges:

All statistical figures confirm that English is the first foreign language spoken in Europe, well ahead of French<sup>38</sup>. Of course this cannot simply be extrapolated to the EU Judges in general, bearing in mind their educational and professional background, average age, and other uncommon characteristics in comparison with the population as a whole. But, for the vast majority of Judges French is

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<sup>38</sup> [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_386\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_386_en.pdf)

neither their mother tongue nor the first foreign language they learned. This is particularly true for all Eastern European and future Member States.

Also, it is one thing to understand French, but another to be able to deliberate *in camera*, i.e. with no interpreters, on complex issues of EU law. It speaks for itself that during the oral hearings, in particular at the ECJ, a number of Judges use either their native language or English when putting questions to the parties, which are simultaneously interpreted into the language of the proceedings.

While the former are entitled to do so<sup>39</sup>, this illustrates that they don't master the ECJ's working language sufficiently to express themselves orally, even though all it would take, in the case of pre-prepared questions, is reading the French translation to the parties.

If this is the case when asking questions at an oral hearing, what does this mean when it comes to the Judges deliberating amongst themselves *after* the oral hearing?

But the ultimate evidence is provided by the advisory panel (see "The nomination of Judges" below) itself, since it also verifies the candidates' "*ability to acquire proficiency, within reasonable time, in the working language of the European courts*"<sup>40</sup>. In other words, it very much seems that those who are supposed to contribute to the ECJ's "constitutional role"<sup>41</sup> in reviewing the EU's basic legislative activities and interpreting the Treaties, and regulations/directives of the EU are being kindly invited to first take French lessons.

### ***Room for change?***

From my end of the spectrum, there is hardly any room for a *radical* change of the ECJ's working language, as this would most certainly result in a political

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<sup>39</sup> Article 38 (8) RP ECJ

<sup>40</sup> Third Activity Report of the Panel provided for by Article 255 TFEU, 13 December 2013

<sup>41</sup> See e.g. Opinion of the Advocates General in Case C-101/12, *Schaible*, ECLI:EU:C:2013:334 and Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, ECLI:EU:C:2002:197

confrontation between Member States. The ECJ, despite its right to determine its internal functioning, might be caught in the middle of this.

*Risk of political controversy*

The ECJ is most certainly keen to avoid yet another political controversy. It is already more or less recurrently criticized for having a tendency to “build a government of Judges” (Broeksteeg, 2011), and/or not to reason its judgments sufficiently (Dawes, 2007). While this was, for quite some time, a matter discussed among legal experts, it has since then reached some of the highest political spheres in some Member States (Herzog, Gerken, 2008). Even though (or perhaps because) such criticism regarding the ECJ has not yet become a part of the standard repertoire of critiques, unlike e.g. the European Commission, there is every reason to be cautious and avoid yet another political controversy.

The comparatively modest issue of open competition recruitment notices clearly indicating the second language required of candidates for EU official positions, which is most often English, has already sparked controversy between Member States, with Italy<sup>42</sup> and Spain<sup>43</sup> arguing in court against making strong English a mandatory requirement.

Other Member States, such as Germany, are recurrently lobbying for a more rigorous application of the European Commission’s three working languages, i.e. English, French, and German, arguing that in practice English tends to prevail and that the use of German should be strengthened.

Certain Member States who are in favour of French could also use any radical change of the working language as a pretext to question whether the ECJ has adequately fulfilled its important role in the past. Indeed, any official change of working language would suggest that many Judges may not have been sufficiently able to express themselves in French, which in turn may have affected the quality of their work. This may seem speculative at this stage, but

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<sup>42</sup> Case C-566/10 P, *Italy v Commission*, ECLI:EU:C:2012:752

<sup>43</sup> Case C-160/03, *Spain v Eurojust*, ECLI:EU:C:2005:168

when it comes to languages, all Member States have shown remarkable tenacity in defending their languages.

Besides, any radical change, such as replacing French with English as the ECJ's working language, could also entail dissent within the ECJ from those judges most proficient in Latin languages. This could also reignite the debate for those who consider that the French language is more precise than English (Vinay/Darbelnet, 1995), yet another vast subject.

In addition, giving French and English equal status at the ECJ, as is the case at the ECHR, would generate translation costs and delays.

#### *Possible approach*

As an alternative to a radical change of working language the current arrangements could be made less rigid. For instance, instead of imposing French as a working language to *all* its chambers, the GC could give each of them a choice between French and English. Each formation of Judges could then choose which language they prefer by majority vote or on an *ad hoc* basis. After all, between 2009 and 2013, the GC heard 1041 cases in English and only 475 in French during the same period (**Appendix 10**), but subsequently, the Judges deliberated on each case in ... French.

If such arrangements were to materialize, they would only apply to the deliberations. The judgments would still be drafted in French, since it would come at a considerable cost to adapt the ECJ's translation services to a language other than French.

#### **Second theme: Twenty-four official languages**

Over the years, the number of official EU languages has risen dramatically, to twenty-four, as a result of successive EU enlargements and because the EU is a unique political instance where many different languages coexist in a comparatively small geographical area.

### *Solutions creating problems*

National languages are a fundamental part of national identity and culture (Trivedi, 1978) and are thus often enshrined in the national constitutions<sup>44</sup>. Consequently, they enjoy a special status under EU law. Not only does this mean the EU now has twenty-four official languages, but Art. 64 Statute ECJ guarantees that this will not change, since it provides that “the rules governing the language arrangements applicable at the Court of Justice of the European Union shall be laid down by a regulation of the Council acting *unanimously*.” This impossibly high procedural bar speaks for itself.

Due to the magnitude of this linguistic régime, all European institutions, including the ECJ, need to have large translation units. The European Commission has two Directorates General for this purpose, one responsible for translations, the other for interpretations. In addition, there is the Translation Centre of the EU in Luxembourg. This has led to recurrent criticism regarding the cost of translations for all EU institutions (see. e.g. Owen, 2005).

How well-founded are those criticisms?

In 2006, all EU institutions taken together spent one billion euros on translations (Castle, 2006), which is around two euros per EU citizen per year. This is not exactly a large amount.

How much room is there to save on these costs? This is a popular question in times of tight public finances, but public expectations might go well beyond what can effectively be achieved:

EU legislation, i.e. Regulations and Directives, are binding upon the Member States and thus *must* be published in all twenty-four official languages. Otherwise, the addressees would be at risk of breaching EU law out of linguistic ignorance.

Regarding the EU judiciary, there is hardly room for further linguistic rationalization. Judgments of the ECJ need to be translated into all official languages, since this is the highest judicial instance of the EU responsible for

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<sup>44</sup> See, e.g. Article 8 of the Austrian Constitution



interpreting EU law. In the case of the GC, only the more important judgments are translated in all languages, while in the CST, decisions are normally only available in French, i.e. the working language, and, as the case may be, the language of the case.

Limiting the number of languages of procedure is equally unrealistic: Member States will never renounce using their language in ECJ proceedings, let alone accept a drastic solution, as seen at the Administrative Tribunal of the ILO, where applications may be only lodged in French or English. And who would have the political courage to convince the Member States to *renounce* their national language in proceedings at the GC, thus telling the majority of citizens and companies concerned that they may no longer use the official language that suits them? After all, the concept of European citizenship, which is enshrined in EU primary law<sup>45</sup>, includes the right to address the EU institutions in one of the official languages. Also, while the official languages of the Council of Europe are French and English, applications to the European Court of Human Rights in Strasbourg may be lodged in one of the official languages of the contracting parties<sup>46</sup>. Thus translations remain necessary; whether machine translation (Wagner, 2014) will substantially curb costs remains to be seen.

There is a limit to the free choice of procedural languages though, since in appeals from the CST to the GC the “language of the case shall be the language of the decision of the CST against which the appeal is brought”<sup>47</sup>. In other words, the language chosen at first instance determines the language of all subsequent appeals. This rule is convenient for appeals since there is no additional need for translations. But in a number of instances, it limits the applicant’s right to turn to a different lawyer for the appeal, should he be an expert in the subject or procedure, but not a master of the language at first instance<sup>48</sup>. While the appellant may seek a derogation from this rule, provided

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<sup>45</sup> Article 20 TFEU

<sup>46</sup> Rule 34 of the Rules of Court

<sup>47</sup> Article 136a Rules of procedure of the GC; see also Article 37 (2) b) Rules of procedure of the ECJ.

<sup>48</sup> Which is what happened to the appellant in Case T-330/14 P, *Jelenkowska-Luca v Commission*.

he lodges a duly reasoned application in a timely manner, he has no guarantee whatsoever that the appellate Court will accept such request.

### ***Problems awaiting a solution***

Other EU topics do have room for cost-saving, as one would expect:

Every month, MEPs travel from Brussels to Strasbourg to attend a four daylong session, a “travelling circus” (Mendick, 2014) that comes at the price of one hundred and thirty million GBP per annum. Such expenditure is not the result of an objective necessity, but the price of a political symbol, since Strasbourg is one of the three cities, next to Brussels and Luxembourg, which are situated on the border line between the Germanic and the Latin world, two “tectonic plates” historically speaking.

Today, however, this extensive travelling has become a major symbol of how substantial amounts of public money are wasted, year in and year out. Any change to this requires unanimity among the Member States, and the host Member State, France, is unlikely to support such change.

But beyond the mere financial cost of the practice, it is time for *all* Member States to understand that this kind of chronic absurdity that contributes to mounting public opinion against the EU.

## **Third theme: The nomination of Judges**

### ***Introduction***

For many in the general public, it is almost a Pavlovian reflex to scrutinize who is to be nominated as a member of e.g. the European Commission. There is no such attention when it comes to those nominated to become a Judge at the EU Courts, despite their far-reaching powers.

Not surprisingly, the provisions governing the nomination of the Judges and Advocate-Generals at the EU-Courts<sup>49</sup> remain little explored. Since such nominations cannot be challenged in Court, no case law sheds any light on this.

### *The panel*

The substantive criteria for being nominated as an EU-Judge have always been particularly demanding<sup>50</sup> and starkly differ from the simplicity of nomination. Prior to the Treaty of Lisbon, each Member State would propose a name to the Council and the latter would normally rubber-stamp the proposal. Since then, a panel<sup>51</sup> comprising seven members gives an opinion on whether a candidate is suitable to perform the duties of Judge or Advocate General.

The system is, in principle, well thought out: while the panel's views are not binding on proposing Judges nor other Member States' approval, the latter have hitherto always followed the panel's opinion<sup>52</sup>. That said, the panel can only accept or reject nominations; there is no open procedure where candidates are ranked in order of merit<sup>53</sup>.

Up to this day, the panel has only found that five out of forty-one proposed persons were not suitable (Dumbrovsky, Petkova, van der Sluis, 2014), including one candidate from Malta (Camilleri, 2012) and one from Sweden (Jääskinen, 2013).

Nevertheless, the current nomination "procedure" shows some deficits:

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<sup>49</sup> Art. 253 et seq. TFEU

<sup>50</sup> Art. 253 (1) TFEU: "The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence..."

Art. 254 (2), 1<sup>st</sup> sentence TFEU: "The members of the General Court shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office."

<sup>51</sup> Art. 255 (1) 1<sup>st</sup> sentence TFEU: "The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognized competence, one of whom shall be proposed by the European Parliament"

<sup>52</sup> Panel's third activity report, 13.12.2013, p. 10

<sup>53</sup> Response from the Council of Bars and Law Societies of Europe to the follow up inquiry into the Workload of the Court of Justice of the EU, [www.ccbe.eu](http://www.ccbe.eu)

### ***Member States not doing their homework***

The above-mentioned statistics illustrate that the Member States concerned did not use all appropriate means in order to determine beforehand whether the person they nominated fulfills the substantive requirements for an ECJ judge. Whether this is the result of politics interfering with the process, poor organization, underestimating the importance of the aforementioned criteria, or simply a *de facto* delegation of the “field” work onto the panel is a matter for speculation.

What matters is that the substantive criteria in Articles 253 et seq. TFEU imply an *obligation* of the Member State concerned to thoroughly assess the candidate prior to making any formal proposal. Thus, it seems justified to specify in the relevant provisions that all Members of the Union are obliged to thoroughly vet their candidates, while they may determine the specific modalities of their national selection procedures for themselves. This would ensure dual review processes: one at the national source and a second review at the panel level.

### ***Gender equality***

A further little-explored issue is whether gender equality should be enforced within the EU judiciary, at least at regards the ECJ, given its constitutional role. This would mean that ideally, fourteen out of twenty-eight Judges should be women. Currently, out of thirty-eight members of the ECJ, i.e. the twenty-eight Judges, nine Advocate-Generals and the Registrar, only six Judges and two Advocate-Generals are women.

This leads to the question whether there should be more gender balance and, if so, how this is to be achieved. From a more political point of view a balanced composition of the ECJ might be a strong symbol. But from a legal perspective this seems to be more of an illusion than anything else:

Firstly, the EU Courts are not an “employer” and even if they were they would not be under a *de jure* obligation to recruit an equal number of female and male Judges.

Secondly, the Member States are sovereign in nominating “their” Judge and all they need to take account of is the - very demanding - substantive criteria for the nomination of Judges, which is not a matter of gender, let alone gender equality.

Any addition of such criteria bears the risk of making the nomination of EU Judges more political, while the panel was created in order to prevent such tendencies. Otherwise, we may as well turn back to the times when the European Parliament demanded, in the 1980s and early 1990s, that it should have the right to choose the Judges (Cordelli, 2013).

Thirdly, the panel must carry out its assessment within the limits of its mandate<sup>54</sup> and has thus no authority to add criteria regarding gender or any other aspect.

Consequently, I am of the view that the composition of the EU courts is anything but the ideal test case for vindicating more gender equality in EU institutions.

### **The selection of judicial assistants, a Judge’s prerogative**

Each Judge at the ECJ is assisted by three “référéndaires,” i.e. judicial assistants, who carry out the bulk of the judicial work and all the “field work,” including drafting the judgments. This does not in any way suggest that the Judges’ role is thus limited to a more or less supervisory role, but it is very clear that without said assistants there is no way the individual Judge could ever cope with the workload.

The legal status of “référéndaires” is one of temporary agents<sup>55</sup> who are given a mandate. But, by contrast to other EU temporary agents, there is no formal recruitment procedure. Every Judge is free to select the candidate according to his or her own criteria (Kenney, 2000). Then the Judge proposes his or her candidate to the President of the judicial instance, who either accepts or refuses the proposal. This exception to the normal recruitment procedure is justified by

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<sup>54</sup> Article 255 TFEU

<sup>55</sup> Article 2 c) CEOS

the fact that there is a special relationship of trust between the Judge and the “référéndaire,” the recruitment being thus “*intuitu personae*”<sup>56</sup>.

There is no doubt in my mind that any Judge needs to be able to trust his or her “référéndaire” professionally and morally, at all times, which makes the status of the “référéndaire” specific enough to justify the absence of any formal selection procedure. But does this mean that the selection of the “référéndaires” should remain a matter decided between the proposing Judge and the President, as it is now? In this respect, the following should be taken into account:

In practice, the President must understand that any Judge needs to be able to rely on “référéndaires” at any stage of his mandate. Thus, the President’s assessment of the person proposed is likely to be minimalistic, for a number of reasons. The President cannot substitute himself for the proposing Judge in assessing the relationship of trust towards the “référéndaire.” And the President needs to carefully balance the level of scrutiny over these selections with the Judges’ autonomy, especially as the President needs be able to rely on the Judges - who elected him - at all times.

All of this is perfectly understandable. But on the other hand, the “référéndaires” are not the “personal” assistant of the Judge, since they are not remunerated by the Judge, but by the institution for which they work. More importantly, “référéndaires” contribute substantially to the judicial activity of the EU courts. The question is thus whether one should reflect on a way to ascertain whether every candidate has the necessary qualifications for assisting a Judge or Advocate General. This would need to be a rather demanding examination comprising a written and oral part. Also, it seems appropriate to require a minimum number of years of experience, e.g. ten years. Such a rule would also prevent the age gap between Judge and “référéndaire” being too big, given the Judges’ average age.

Alternatively and at the very minimum, the President of the judicial instance concerned should seek external advice when it comes to recruiting or extending the contracts of the eighty-four “référéndaires.” One way of achieving this

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<sup>56</sup> Case T-103/07, *Duta v ECJ*, ECLI:EU:F:2008:105, paragraphs 26-28

would be inviting the panel, which is consulted for ECJ judicial nominations, to give its views about the suitability of the “référéndaires.” Even though the President of the ECJ or the judicial instance concerned would not be bound by that opinion, he would still benefit from experienced views of those outside the immediate context.

### **Fifth theme: Referrals for preliminary rulings**

A referral for a preliminary ruling is a non-contentious procedure enabling any national Judge to ask one or several questions about how to interpret EU law provisions or whether an ECJ Regulation or Directive remains valid. National judges will normally do this if the answer is not to be found in the existing case law.

The importance of this procedure for EU law in general is illustrated by a number of landmark judgments about e.g. the principle of the primacy and direct effect of EU law and the liability of Member States in the case of infringements of EU law.

### ***Inadmissible orders for referral, a chronic phenomenon***

Despite the obvious utility of this procedure for national Judges, year in year out, a number of referrals for preliminary rulings turn out to be either completely or partly inadmissible. Every inadmissible order is a waste of time and resources for both the ECJ and the national judges concerned and is also frustrating for all involved (Wägenbaur, 2000).

Why is this still the case, after sixty years of existence of this consultative procedure? There seems to be a joint responsibility between the EU legislator and the national spheres in this respect. For many decades, until 2013, the ECJ’s rules of procedure did not even define the factual and legal content required for these orders (Wägenbaur, 2000), in contrast to the clear requirements governing the contents of applications, statements of defense, and other steps of the written proceedings.

The ECJ was obviously aware of this *lacuna*, since it decided, in 1986, to publish “*recommendations to courts and tribunals in relation to the initiation*

*of preliminary ruling proceedings,”* which is a sort of *vademecum*. However, the ECJ’s statistics reveal that these recommendations, which were amended several times, did not substantially remedy the phenomenon, possibly because they remained unknown or were simply too abstract.

In 2012, the ECJ finally decided to add a definition of the contents of an order of referral to its rules of procedure. But this did not really help either, as the numerous orders of inadmissibility handed down in 2013 and 2014 illustrate (**appendix 11**).

### ***Possible remedy***

A practical and simple way to curb the number of inadmissible referrals would be to provide the national Judges with a specific form for preliminary rulings. Such a form should contain chapters, headings, and sub-headings that accurately reflect the legislative definition of an order of referral, together with explanatory statements.

However, using such a form could not be made compulsory and hence needs to be voluntary. It is true that in EU law the use of certain forms is compulsory, such as the “official forms for standard merger notifications” or the legal aid form. This is because both are part of EU regulations, which are, by definition, binding. This is different than a referral of a question for a preliminary ruling, which is based upon cooperation and mutual trust between sovereign Judges. Thus, the ECJ has no ability to require the use of any such forms.

Instead, the ECJ could seek inspiration from the “nudge theory”. This is an alternative to direct instruction, which presents a nudge as “any aspect of the choice architecture that alters people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives” (Thaler/Sunstein, 2008: 4).

Here, the ECJ could convince the national Judges of the added value of using the form. This could happen by showing how the form improves substantive contents of submissions, as well as layout and ultimately, user-friendliness. The ECJ could seek inspiration from studies (Gouscos, Rouvas, Vassilakis,



Georgiadis, 2002) or governmental documents<sup>57</sup> on the correlation between layout, design, and colors of administrative forms and effective use by citizens.

In my view, this is also a matter of how the form, once it is well designed, is presented. It could begin with an indication that the form is meant as practical guidance for national Judges and that using it is within the spirit of good cooperation between national Tribunals / Courts and the ECJ, a message which would be close to a *de facto* obligation, without being perceived as such.

### **Sixth theme: Legal aid**

Legal aid is not the first subject that comes to one's mind in the context of proceedings at EU courts, given that their jurisdiction differs so much from what we are used to in the Member States. Yet the rules of procedure of all three judicial instances provide such possibility for individuals.

A somewhat unexpected and unexplored phenomenon, however, is why very many requests for legal aid to e.g. the GC are rejected as manifestly inadmissible because the GC has no jurisdiction for applications by individuals against other individuals, legal persons, Member or third States, etc. Persons applying for legal aid in order to sue e.g. universities, the Crown Prosecution Service or retailers, such as "Lidl" (**Appendix 12**) in the EU Courts, illustrate that there is a lack of knowledge or a failure in communication regarding the EU courts' role and jurisdiction. Effective preventive action is urgently required.

To some extent, this phenomenon may have to do with the fact that a request for legal aid is the only procedure before the EU judiciary where involving a lawyer is *not* compulsory.

To prevent this, the GC so far provides advice within the "legal aid application form" which explains the limits of the GC's jurisdiction. But one can tell from the number of inadmissible requests for legal aid that this does not remedy the problem. This regrettable and chronic situation needs a more efficient way to

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<sup>57</sup> See e.g. "Key Principles and Practices to Effectively Design and Communicate Australian Government Forms", January 2006; <http://catalogue.nla.gov.au/Record/4802063>

prevent this phenomenon. One approach could be to making compulsory filling out an *online* form compulsory. This form could require the applicant, as a first step, to select one or several potential defendants out of a predefined list. Failure to do so would prevent the applicant from filling out the remainder of the form. For those who do not have a computer, something equivalent could be provided in paper form in order to ensure equal access to the application process. Such a measure is likely to prevent many manifestly inadmissible applications for legal aid from materializing.

One could also reflect on a modest filing fee (e.g. 100€) to be reimbursed if application is found admissible.

For all those who believe they have a cause, but not one that may be heard by the EU Courts, it is worth reflecting on other, more efficient means of publicity, such as contacting the press or a member of the European Parliament. This is of course their own decision and responsibility, as the ECJ has no guidance to provide them with such advice, be it via its website or otherwise.

### **Seventh theme: Privileged status for EU civil servants?**

On the continent, the view that EU civil servants are too numerous and overpaid is widespread. Certain members of the UK press seem to agree (Murphy, 2012).

This criticism is not well founded in every respect: with a workforce of about thirty three thousand, the EU creates and applies the common rules applicable to twenty-eight Member States with about five hundred Mio. citizens. By contrast, a single city such as Cologne, which has about one million inhabitants, employs the same number of civil servants as the EU, albeit at a lower pay grade. In addition, the public generally does not know that the Member States have recently decided to reduce the EU's work force by 5 % over 5 years.

In my view, there are other aspects, which lend themselves more easily to objective critique, at least from a lawyer's perspective. For instance, while

individuals and companies from an EU state or a third-party country have a time limit of *two* months for lodging an action for annulment against a decision adopted by an EU institution,<sup>58</sup> the civil servants of the EU are given a *three*-month time limit<sup>59</sup>.

What justifies such a substantial difference in treatment? Pursuant to a long line of case law, “there is a breach of the principle of equal treatment where two classes of persons whose factual and legal situations are not essentially different are treated differently or where different situations are treated in an identical manner”<sup>60</sup>. The same is true of the principle of non-discrimination, which is merely the specific expression of the general principle of equal treatment and constitutes, in conjunction with the latter, one of the fundamental rights of Community law. Persons seeking the annulment of an individual decision are in a comparable situation, as they also need to be represented by a lawyer. The difference is that prior to going to Court, EU officials need to initiate an administrative complaint against the individual decision. Thus, prior to going to Court, the complainant is already rather familiar with the factual and legal issues, while defendants do not have the opportunity of challenging a given decision by way of such complaint.

This inequality is exacerbated by the fact that civil servants of the EU benefit from a time limit that is fifty percent longer than the “normal” two months applying to the average person.

Moreover, many if not most contentious matters brought by EU civil servants concern far less complex matters than those in matters like merger control, competition, state aid, anti-dumping, etc., while all of the latter are considerably more important in terms of amounts in dispute, economic impact, etc.

Against this background, the civil servants of the EU are better treated in terms of length of time-limit for bringing a complaint before the court with no objective justification for such preferential treatment. It would thus be

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<sup>58</sup> Art. 263 (6) TFEU

<sup>59</sup> Art. 270 TFEU and Art. 91 Staff Regulations

<sup>60</sup> Case T-195/02, *Briganti v Commission* [2004], paragraph 41.

appropriate to provide a time limit of *three* months for all actions for annulment, regardless of the status of the applicant.

In my view, this issue is not solely a legal one. It is also an important issue of public perception. Addressing the imbalance of time limits provides an opportunity for the EU legislator to contribute to a higher degree of equality in proceedings before the EU Courts.

This would be similar to an earlier legislative amendment which abolished a privilege granted to EU civil servants as part of their special status regarding the costs of the proceedings, which meant that they if they lost the case they would, as a rule, only bear their own costs, while anybody else would, if defeated, also have to pay the other party's costs.

### **Eight theme: Judicial costs**

Proceedings before the EU courts are “free of charge, except where a party has caused the judicial body concerned to incur “avoidable costs” or where “copying or translation work is carried out”<sup>61</sup>.

This rule raises a number of questions:

First, the absence of court costs dates back to the days when the ECJ was the only judicial instance of the EU. The reason for this generous exemption may have been that no one should be deterred from pursuing any action at the ECJ and that the obligation to be represented by a lawyer is costly enough, depending upon the Member State.

In the meantime, however, the number of judicial instances has increased from one to three, and the number of cases has risen sharply. The amounts in dispute, in particular at the GC, have reached record-breaking highs. In the past ten to fifteen years it is not uncommon for the total amount of fines in competition cases to reach several hundred million €, and in some instances well over one billion €<sup>62</sup>. These cases, as well as those regarding merger

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<sup>61</sup> See e.g. Art. 90 Rules of procedure GC.

<sup>62</sup> Case T-286/09, *Intel v. Commission*.

control and misuse of dominant positions, tend to be complex and often involve many interveners. As a result, some oral hearings may take several days. Moreover, the length of certain written judgments illustrates the amount of work generated by such complex cases. For instance, the judgment in the *Intel*-case comprised 296 pages. In Joined Cases T-25/95 et al, *Cimenteries CBR a.o. v. Commission*, it reached a historic 1.400 pages.

Yet applicants to the GC do not pay *any* court costs, since currently *all* costs of the EU courts, which were €334 million in 2011, come out of the EU budget, meaning that ultimately the EU taxpayer pays. Thus, after having suffered the hugely detrimental economic effects of e.g. price-fixing, market partitions, and other hard core anti-trust behavior, every European citizen still had to pay all court costs in e.g. Case T-541/08, by which *Sosal*, the world's largest producer of coal-based petrol, managed to reduce the fine imposed by the European Commission from €318 million to €150 million after a court case which took six years. This total exemption from court costs applies even when, after years of proceedings at first instance, an unhappy company appeals the judgment to the ECJ.

This is in contrast to the rules on court costs existing, e.g., at the UK Supreme Court<sup>63</sup>. Why should this fundamentally differ at the judicial instances of the EU? This question arises even more for those applicants who do not pay any corporate or other taxes in the EU. This issue, which I raised in my Commentary<sup>64</sup>, has at last been taken up by MEP *Lehne* (Kinsella, Duke, 2013). In my Commentary I could not possibly extend this discussion to further aspects, with which I will now deal. Here I will reflect on a mechanism that would ensure that EU citizens' interests are better taken into account when adopting ECJ rules of procedure:

So far, the legislative process for the adoption of the rules of procedure only involves the ECJ and the Council of the EU, unlike the "normal" legislative process for the adoption of Directives and Regulations, which includes the Commission, the European Parliament and the Council. The ECJ is likely to

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<sup>63</sup> The Supreme Court Fees Order 2009, as amended.

<sup>64</sup> See p.732

define any amendment according to its own interest, which is essentially to ensure that the proceedings are dealt with as swiftly and effectively as possible, while still complying with various general principles of law.

Thus, it would seem that there is no particular incentive within the ECJ to make paying court costs a general rule, since this is primarily a political issue. In theory, the Council, which votes on the EU budget, should be more receptive towards this issue. This leads to the more fundamental question of who is looking after the interests of the European citizens in the context of the rules of procedure.

I do not suggest involving the European Parliament in the legislative process, given the very technical nature of the rules of procedure. But this is all the more a reason to require the ECJ to carry out an “impact assessment” of the rules of procedure on the interests of the citizens and to take account of the results when making a proposal to the Council. After all, the European Commission carries out an “impact assessment” in the context of the “classical” legislative process.

## SECTION 4

### Limitations and constructive feedback

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#### From my perspective

##### *Drawbacks of being a single author*

My choice to be a single author (see Section 2 above) came at the price of having to comment upon certain provisions even though other authors were likely to be better placed to do so. For instance, the provisions governing the “internal sphere” of the three Courts are a typical subject for insiders, e.g. “référéndaires.” But “référéndaires” have busy schedules and are thus rarely available. In addition, as temporary agents of the Court they need to inform their employer beforehand of any publishing project<sup>65</sup> and there may be objections. I also assumed that Judges might be reluctant to contribute to a Commentary on procedural rules edited by a lawyer, as they might prefer to see their name come first, the role of a lawyer being limited to that of a possible co-author in their minds. But then again, admittedly, I was not very tempted to test my assumption as this would have taken considerable time while there was an urgency to get the project done. I also convinced myself that the provisions governing the internal functioning of the Courts would not be of primary interest to the main target group, i.e. the practitioners. This was certainly true to some extent, but also somewhat presumptuous, since the judiciary was also part of my target audience (see Section 2 above).

At this stage, with the urgency gone, I am now considering changing my initial approach and inviting insiders of the ECJ to provide commentary on more institutional provisions, once the forthcoming second edition of the Commentary materializes. Assuming I have my publisher’s approval, this edition will appear once the Council adopts the GC’s pending proposal regarding its rules of procedure.

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<sup>65</sup> Art. 17a (2) Staff Regulations

I have deliberately renounced the idea of adding a foreword by someone with an elevated status in the profession to lend credibility to my work by explaining the importance and legitimacy of my Commentary. This was not because I am someone who only trusts his or her own writing. Rather, I see a foreword as a form of recognition of true, rather than perceived, merit of a particular work. Thus, it is more appropriate for the second edition of the Commentary to have a foreword. The second edition of my German commentary, which is due to be published in early 2016, will provide me with such an opportunity.

While spending four years writing the Commentary, preceded by another four years spent on the German book, was undoubtedly beneficial in terms of learning, I also became aware that I risked spotting procedural issues everywhere, yet another aspect of the “tunnel view” (see Section 2) I am eager to avoid.

Finally, my apprehension that I might in the end grow tired of this subject, which is also part of my daily practice, did not materialize, fortunately, despite a clear degree of *fatigue*. When my publisher contacted me recently about publishing a second edition of my German commentary, I was probably as enthusiastic as when I published my first legal article, some 20 years ago.

### **Critical reviews by academics and Judges**

I see book reviews (**Appendix 7**) as an important source of further learning. In her succinct review, a German national Judge by the name of Maria Lena Lux, notes that the Commentary reflects the substantial forensic expertise of the author and that its readability is enhanced by the abundant use of footnotes. The latter is also emphasized by Picod in his review (see below).

In his book review Carrick finds that “*A notable and disappointing, omission from this analysis is a presentation of the Rules of Procedure of the European Union Civil Service Tribunal.*” I am tempted to reply: yes and no. The merit of this comment depends upon what the reviewer means: Commenting upon each and every article of the rules of procedure of the CST would have been clearly



disproportionate. There was no objective need for it, since about 90 % of the rules of procedure of the CST are identical to those of the GC. Also, this would have very substantially increased the number of pages, as Picod rightly points out, and thus the price of the book. In addition, practitioner demand for CST rule commentary is very limited. This is a niche area practiced by some fifty to one hundred lawyers in the EU, if at all, with French as the predominant language of the proceedings. I thus decided that while commenting upon the rules of procedure of the GC, I would integrate specific chapters whenever the RP of the CST differed from those of the GC.

That said, Carrick's critique gave me the idea of adding a table that lists the major differences between the RP CST and the RP GC. I will do so in the forthcoming second edition of my German commentary and for the second edition of my English book at a later stage - provided that the CST has not been abolished by then (see Section 3 above).

Carrick also points out that the Commentary is "quite superficial" on some matters, such as in relation to the "forthcoming increase of the number of Judges in the GC" (see Section 3 above), while adding that "it is not in the nature of a project such as this to lean on the side of holistic analytical rigor."

From my perspective, the issue of the GC Judges is not an ideal example for making such statement. My commentary aims at "a holistic approach to issues relating to proceedings" before the EU courts, as Augustyniak rightly notes in his rather detailed book review. The issue of the number of Judges is undoubtedly an interesting subject, but it is an *institutional* matter, which is not a procedural rule proper and has only a very indirect bearing on the daily judicial proceedings. I nevertheless addressed it and also reflected on alternatives for the sake of completeness. But it would have been outside the subject and reader demand to embark onto an in depth analysis of this subject, as interesting as it is.

My preceding comment applies *a fortiori* to Augustyniak's view that I should have covered the provisions governing the Commission's infringement procedure against Member States. This would have broadened the subject beyond the procedural issues. But I will take Augustyniak's point up to explore

with my publisher whether it would be of interest to broaden the subject of the Commentary so as to cover the provisions in the TFEU and the TEU laying down the foundations of the EU judicial system.

While this example is, as such, of very little importance, it does in my view illustrate something more fundamental, i.e. that publishing is also about the author's ability to put many different factors- such as choosing and addressing the subjects according to the readers' demand, the time factor, economic constraints, such as production costs and the selling price, etc.- into the "right" equation - bearing in mind that any re-edition of the book also provides the opportunity of reviewing the balance struck.

Carrick concludes that *"such a project is quite original and long overdue given the demonstrable neglect of the CJEU's rules of procedure within academic literature. As such, this book presents, at the very least, a platform for further research, as well as a useful resource for scholars and practitioners alike"*. For a first edition this probably means: Mission accomplished.

In his book review, Picod stresses *inter alia* the added value of the various tables and statistics I have inserted into my Commentary with respect to e.g. the taxation of costs or legal aid. This is a welcome echo coming from a scholar regarding information that is primarily useful to practitioners. But Picod is also perfectly right in finding that a general bibliography is missing. It is true that this would indeed provide a useful overview on the various monographs and legal publications I refer to in the footnotes. This would be particularly useful for scholars and will be added to the second edition.

The Dutch *"Tijdschrift voor Europees en economisch recht"* accurately remarked that my Commentary is concise, matter-of-fact, and also sometimes more personal<sup>66</sup>. The latter seems to allude to, amongst other things, the views I express in the preface. More importantly, this review reminds me that the concept of an article-by-article Commentary is much broader than that of a purely academic perspective, focused on theory and observation, with respect

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<sup>66</sup> „In het beknopte, zakelijke, maar tegelijkertijd ook persoonlijke commentar...”

to a given subject. At the same time, academia benefits from the Commentary, as Carrick rightly concludes.

### **Critique by “the market”?**

In the case of e.g. a novel, the number of copies sold is normally evidence of a positive review, in particular if it becomes a bestseller. The circumstances regarding a legal book, however, are substantially different. The decision to buy such a publication is not, as such, an expression of positive or indeed any other form of critique. For instance, university libraries select their resources according to a variety of criteria, such as the relevance to the curriculum; demand for the subject matter; uniqueness of the title or presentation of information; cost/benefit analysis; its value for both university and professional research; and an assessment of how students and other stakeholders rate its accessibility and practical value.

A further indicator, which I see as reliable or more so than any book review, is to date, as already pointed out in Section 2 above, the Library of the ECJ has purchased a total of fifteen copies, eight of which are “permanently borrowed” by cabinets of Judges at the ECJ. This is in addition to the seven copies of the German commentary on permanent loan (**Appendix 5**).

In their judgments, the ECJ and the other judicial instances never refer to legal publications. This may be due to a variety of reasons, one being French legal tradition, which itself reflects views that law is a science. Citing legal scholarship would undermine the ‘majesty’ and ‘authority’ of judicial rulings by suggesting that there could be more than one answer per legal question or that there is room for interpretation or discussion. From the ECJ’s perspective, it may be necessary to see things in this way, but one should not forget that e.g. in Germany, the Federal Constitutional Court and the Supreme Court, commonly refer to scholarly books, including my German commentary<sup>67</sup>. This seems to indicate that there are different schools of thought when it comes to being worried about the authority of judgments being undermined.

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<sup>67</sup> BVerfG, 2 BvR 1178/07, order of 9.2.2010; BGH, VIII ZB 3/11, order of 8.5.2012;

There may be another, more EU specific reason, i.e. that it may be politically delicate to quote authors, bearing in mind that in certain Member States of the EU, authors of EU publications are much more productive than in others. By contrast, it does happen, albeit very rarely, that the EU Courts express their views as to the quality of an agent's or lawyer's arguments or work in a more eloquent manner than simply sharing a lawyer's views<sup>68</sup>:

In the aforementioned referral proceedings in Case *Haïm*<sup>69</sup>, an important case on liability of the Member States in which eight parties, including the Commission, which I represented, gave their views on the preliminary questions, (see Section 2 above), Advocate-General Léger held: "*It was the Commission which set out, most clearly and most exhaustively, the evidence to this effect, and I can but repeat its line of arguments...*". The remainder of the Opinion reads accordingly.

In Case *Kschwendt v Commission*,<sup>70</sup> which I pleaded for the defendant, the then Court of First Instance of the EU<sup>71</sup> held: "*The interested party [the applicant] did not even attempt to criticize the validity of the numerous quantified, precise and concordant elements collected by the services of the Commission, at the price of a considerable amount of work...*"<sup>72</sup>. What the Judges could not possibly express is that the work was carried out by the external lawyer to whom the Commission had outsourced this case.

### **What the Commentary cannot achieve**

In the course of my litigation practice I often note to what a surprising extent many litigators disregard certain obvious procedural rules. For instance, while appeals against decisions at first instance are limited to points of law

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<sup>68</sup> In its Judgment in Case F-15/10, *Andres A.O. v. European Central Bank*, in which I represented the ECB, the Judgment repeatedly indicates "as the ECB rightly points out" (see paragraphs 161, 213, 295, 323, 347, 354)

<sup>69</sup> Case C-424/97, *Salomone Haim*, [2000], ECR 2000, I-512.

<sup>70</sup> Case T-545/93, *Kschwendt / Commission* [1995], paragraph 119.

<sup>71</sup> The predecessor of the GC.

<sup>72</sup> Free translation of: „L'intéressé n'a même pas tenté de critiquer la validité des nombreux éléments chiffrés, précis et concordants réunis par les services de la Commission, au prix d'un travail considérable... »

(Wägenbaur, 1995; idem, 2003) many appellants will nevertheless e.g. contest facts or sometimes even attempt to change the subject matter of the proceedings at first instance. It is also manifestly mistaken to lodge an appeal drafted in a language other than the one chosen at first instance<sup>73</sup>. While this is sometimes due to the ignorance of some lawyers<sup>74</sup>, it appears to be deliberate in the case of some of their more experienced colleagues. If appellants were to rigorously comply with all rules governing the admissibility of an appeal, they might quickly realize they have either little or nothing to validate an appeal. In the end, this reflects the fact that there is an automatic right to appeal, meaning that there is no requirement to apply for permission to appeal, unlike in the UK. Nor are there any Court costs to be paid by the appellant. These are subjects which lend themselves to being further explored.

Staff cases are another sector where determination and sometimes-retaliatory desperation guides certain applicants, thus becoming a fertile source of case law regarding procedural questions. For instance, a former Commission official who has become a notorious ECJ applicant, has the unique record of 210 procedures before the three EU courts. In March 2014, this former official's lawyer has been excluded from five contentious cases for interfering with the good administration of justice<sup>75</sup>, the first case of exclusion in EU history. The applicant's new lawyer did not learn the lesson, however; he was excluded in December 2014<sup>76</sup>.

The above example and similar cases e.g. in which a lawyer persistently refused to reduce the extraordinary number of pages of their written submissions to the GC rule<sup>77</sup>, illustrate that it is indeed time to reflect on a common ethical standard for Counsel before the European Court of Justice,

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<sup>73</sup> Case T-330/14 P, *Jelenkowska-Luca v Commission*.

<sup>74</sup> The CST rejected Case F-45/12, „BT“ v *European Commission* [2012] as manifestly inadmissible, because the lawyer failed to raise any pleas in law in his application, thereby ignoring a very elementary procedural rule, which reflects common sense. Subsequently, when he appealed this order to the GC (Case T-59/13 P) the lawyer argued, amongst other, that the CST should have made “a verification of its own motion on the legality of the decision questioned”. In other words, the Judges should substitute themselves to the lawyer.

<sup>75</sup> Cases F-90/13, F-89/13, F-65/13, F-62/13 and F-58/13, *Marcuccio v Commission*

<sup>76</sup> Case F-14/14, *Marcuccio v Commission*

<sup>77</sup> Case T-199/11 P, *Strack v Commission*, Joined Cases T-197/11 P and T-198/11 P, *Strack v Commission*, which I pleaded for the European Commission

which is what Sarvarian has undertaken in an article published in 2012. Sarvarian examines “the considerable problems in practice arising from questionable professional conduct by representatives” and notes that “the absence of a prescribed code of conduct setting out the Courts’ precise standard for representatives is a threat to the Court’s procedural integrity and legitimacy” (Sarvarian, 2012: 991). I cannot but fully subscribe to his proposal that the national Law societies should “draft a code of conduct for the European Courts, which could ultimately be adopted by the national Courts and integrated into national codes of conduct” (Sarvarian, 2012: 991).

## **SECTION 5**

### **Critical reflections on some of the unexpected issues that arose while undertaking such a critique and their significance**

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#### **Is success pre-determined or a form of personal merit?**

I expected that writing this context statement would primarily require an innovative reflection on my Commentary, which in turn would imply taking some distance from my work, rather than reflecting on e.g. my professional path. But describing my personal positioning in Section 1 gently forced me into contemplating the evolution of my professional life thus far, and as part of this process, asking myself questions I had never really thought about, in particular, whether I had any “merit”.

All I really knew for sure is that e.g. my bi-national background, having been raised in another country, and enjoying the extraordinary privilege of having been born into a period of peace, were amongst those circumstances, which have certainly helped but have nothing to do with any form of merit as commonly defined.

But is this also true for all the steps which, when taken together, may be called “professional success”? In other words, is success predetermined, meaning that there is nothing I can do about it, or is it the result of actions we determine autonomously, in which case there would be room for personal merit? Similarly, is leadership innate or learned (Chase, 2010)?

Here I was contemplating questions that are as old as they are complex and which many philosophers from various cultures have dealt with extensively. I was raised with what is probably a typically Western belief, i.e. that while no one chooses genetics, sociology, upbringing, talents, and other purely circumstantial factors, one important factor leading to success - apart from what we like to call “luck” - is how and to which extent the individual actually *uses* these circumstances in a success-focused manner.

But this does not answer the question of whether deploying such efforts is the result of an autonomously taken decision or whether it is predetermined, the individual having thus no choice other than making result-oriented efforts.

I quickly renounced any attempt to reflect in any deeper way on these questions. Scarce time was less of a reason than my persistent impression that humans are not meant to find *the* answer to this question and many others. This impression may reflect an opportunistic approach, i.e. because I want to believe and remain convinced that an autonomously-determined effort produces success and thus merit, a convenient view after all. What I can say is that meeting the limits of one's horizon is nothing unexpected. While often frustrating, encountering one's limits may actually, in this respect, be reassuring.

### **A tunnel with ... a view**

From an early stage I sensed that any professional, no matter his activity, risks acquiring a "tunnel view", meaning that he would have little if no time to access or understand other areas of his profession. Worse, those with tunnel view would rapidly be unable to venture into any other discipline, even if only superficially. This seems a high price for specialising in one subject.

That said, gradually discovering the particular diversity of my activity as a litigation lawyer in EU law with all its legal, philological, strategic, and political aspects led me to believe that this would, to some extent at least, prevent any "tunnel view." As a further prophylactic remedy I began publishing legal articles on subjects as diverse as possible. Apart from covering procedural subjects, I explored more remote issues such as combating money-laundering, the shortcomings of the Schengen-Agreement, the preamble of the draft European Constitution, on European values, the difficult cohabitation between the internal market and health protection, etc. (**Appendix 2**).

I am convinced that what at first appears to be non-focused publishing activity has actually had a cross-fertilizing effect and, even more importantly, provides me with a number of short sabbatical breaks from my professional activity.



That said, while progressing through the context statement I was disillusioned by my hitherto firm conviction that a “non-legal” discipline could hardly ever provide a meaningful contribution to discussing such an eminently legal - and arid - subject as the procedural rules of the EU judiciary. This was a possible consequence of a formatted mind-set, since adopting a non-legal approach in my professional activity would, in all likelihood, be perceived as unprofessional or showing a lack of legal arguments. I now know that there is room for the coexistence of both openness to other disciplines and practising as a lawyer. The challenge is to strike the right balance. For instance, while writing the context statement, it occurred to me that it would be helpful to create a didactic form, which national Judges may use for referring requests for a preliminary ruling to the ECJ in order to curb the number of referrals that are rejected as inadmissible (see Section 3).

### **Trapped by the concept of the Commentary?**

While doing research on the origin of the concept of an article-by-article Commentary for Section 2 the last thing I expected was to come across publications that question the merits of the concept of a commentary and, what is worse, in a most interesting way. The author (Henne, 2006) explains in essence that, firstly, article-by-article commentaries have a streamlining effect on legal thinking, leaving little or no room for taking account of historical, philosophical, and comparative aspects. Thus, secondly, commentaries are detrimental to monographs, the classical form of communication used by the academic world, and thereby tend to make practice prevail over academia. Thirdly, the authors of commentaries tend to be “rainmakers,” since they effectively decide who of the authors on a given subject are part of the “main stream” line of thinking and who not.

I came to the conclusion that while all of this may be true with respect to German commentaries inside the national context, this does not *ipso facto* apply to my Commentary, which is used by persons from diverse legal backgrounds. On the contrary, not only did I take historical and comparative arguments into account whenever possible, but I used legal publications for the purpose of enriching the discussion, and not dividing them into categories. That said, I see

the thoughts expressed by Henne as a most useful contribution to be kept in mind for the purpose of a future second edition of my book.

### **Educating citizens or cultivating ignorance?**

While working on Section 3 of the context statement I could not avoid a slightly surreal impression: Here I was in the midst of reflecting on a fresh take on various procedural issues, while quite a number of the five hundred million EU citizens can't even tell the difference between the European Court of Human Rights in Strasbourg and the ECJ in Luxembourg. Thus, I was prompted into reflecting on the impact that the general knowledge (or lack thereof) of the citizens of the twenty-eight Member States is likely to have on EU matters. By the same token, it became very clear to me that while my Commentary may well be a major work, this is only true for a comparatively small number of citizens, who tend to have above-average knowledge of the EU anyway.

The findings of the “*Eurobarometer*,” the EU’s polling arm<sup>78</sup>, and other sources (e.g. Norrie, 2014) converge towards the same conclusion: more than sixty years after the signing of the European Treaty on Coal and Steel, the average citizen still has a fairly limited general knowledge of the EU, although many are familiar with iconic keywords such as “internal market”, “Schengen”, the “Euro”, etc. But many citizens have a very limited knowledge of certain EU subjects. This is likely due to the manner in which the subject is presented or commented on by the media, politicians, and social networks such as neighbours and friends. To a large extent this is not surprising, since many citizens do not have much knowledge of the institutional functioning of their own country either, a sphere which should be less remote from one’s everyday life.

But this is not a reason for leaving the level of knowledge on the EU as it is, i.e. rather low. The idea is of course not to “bombard” EU citizens with as much relevant information as possible. This would be naïve, if not arrogant, ineffective, and ultimately counterproductive. Providing information about the

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<sup>78</sup> [http://ec.europa.eu/public\\_opinion/index\\_en.htm](http://ec.europa.eu/public_opinion/index_en.htm)

EU should focus primarily on subjects likely to matter to the individual in his daily life, such as the various fundamental and economic rights EU-law guarantees to the individual. Also, everyone should be aware that the process of European unification provided us with e.g. a continuous period of seventy years of peace in Europe. Admittedly, this may be a more pertinent subject on the Continent than in the British Isles. The message is not one of uncritical adoration of the EU, far from it, but rather one of being more aware of some of its achievements instead of taking things for granted – which I would call a silent disease in our part of the world. Moreover, this helps the individual to e.g. put the views expressed by politicians and the media into a broader context while acquiring the minimum knowledge any democratic participation requires, e.g. through elections to the European Parliament. This leads to the question of who in Europe is responsible for improving general knowledge of the EU and the role of the Member States in this activity? In 2008, the European Union spent 2,4 billion euros promoting itself by distributing classical promotional material, such as booklets, films, open-door days, and funding of NGO's, think tanks and lobby groups which support and promote the EU's objectives (Rotherham/Mullally, 2008). Critics argue that the European Institution on the whole proved an “unsuitable vehicle for informing the people on what the EU is doing” (Rotherham/Mullally, 2008). This is a complex subject begging for a cost-benefit analysis to be carried out by an external body e.g. a consultant.

Some Member States - much more than others - undertake initiatives to provide information about the EU, such as adapting their governmental websites, leading topical campaigns, events, co-operating with NGOs, etc. Again, the question of a cost-benefit analysis arises. Perhaps a less obvious but common sense idea would be to not only insert this education into school curricula, but to consistently develop it over the time it takes for a child to mature to work or higher education level. Teaching pupils about the EU is part of the school curriculum in e.g. France<sup>79</sup>, Ireland<sup>80</sup> and Germany<sup>81</sup>. In the UK (Saviddes,

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<sup>79</sup> [www.sitecoles.org](http://www.sitecoles.org)

<sup>80</sup> [www.eumatters.ie/](http://www.eumatters.ie/)

<sup>81</sup> <http://de.theeuropean.eu>

2003), it appears that a new geography curriculum, published in February 2013, “makes no reference to the economic and political union” (Paton, 2013).

In my view, in order to gain insight into the supra- and international sphere one must first understand the basics of the State and its institutions. Once this insight has been acquired, pupils should gradually discover the fundamentals of European integration, which include the reasons why the European community has been founded and its achievement in terms of peacekeeping, common values and guaranteeing a variety of economic and fundamental rights to all citizens. As with any other subject, though, there should not be any indoctrination of a particular view. Teaching about the EU should indeed be neutral and balanced (Rotherham/Mullally, 2008).

It is also important for pupils to learn to critically discuss EU issues, e.g. the merits and limits of a further geographical enlargement of the EU.

Ultimately, it is less a matter of whether the individual adheres partly, fully or even not at all to the concept of European integration than that every pupil is given a chance to acquire at least a basic knowledge of European integration and to learn to reflect on it, before reaching any conclusions.

Such a pedagogical approach is certainly not specific to the subject of the EU: any Western democracy implies an active participation of its citizens and thus needs to teach and guide its pupils towards becoming active and responsible members of society. This requires, amongst many other aspects, a sufficient knowledge of how society works and learning to think critically. The ultimate challenge for all EU citizens is to find the right balance between their national identity and sense of belonging and those subjects that lend themselves to be achieved in common. We should never forget that a supra-national level cannot exist without a national level, whilst the opposite may well exist.

### **My understanding of professional leadership in the context of publishing**

My ambition of being the first author to publish an English-language, article-by-article Commentary on the procedural rules of the EU judiciary was also functional, since it provided me with much of the energy I needed to persevere

throughout four years of writing. Undertaking the present context statement triggered a change in perception. Reflecting on whether the Commentary is a major work (see **Section 3**) is not just about assessing the various book reviews while waiting for the opportunity of a future second edition. It is, at this stage, about realizing that my Commentary is truly a major work *only* if measured against a competing Commentary.

The situation is similar to the one of a single bidder in a public procurement procedure, which was the subject of a referral case I had pleaded for the European Commission at the ECJ many years ago<sup>82</sup>. The bidder's submission was refused even though he fulfilled all the technical criteria, because determining whether a bidder is value for money is a matter of comparison, which did not exist in that particular case.

I have thus realized that my Commentary is not the leading publication merely because it happens to remain for a relatively long period of time the only publication of its kind on the market. In the end, only comparing it with at least one directly competing publication will reveal the level of value or merit of my Commentary. Thus, I now welcome the idea that other authors might, one day, publish a competing Commentary, rather than hoping to stay as the only remaining publication in this area, as this would ultimately be a self-defeating position.

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<sup>82</sup> Case C-27/98, *Metalmecanica* [1999] ECR I-5697.

## **SECTION 6**

### **Intentional directions**

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#### **Further publishing revisited**

Many of my colleagues taking part in a doctoral program tend to adopt a functional approach: it serves the purpose of obtaining a title and their PhD thesis will thus remain, in many instances, their first and last publication ever. In my case, it is the other way round, as I regularly published prior to this doctoral programme and will go on doing so in the future.

As to next steps, I will be working on the second edition of my German commentary and, at a later stage, of my English Commentary. The GC's legislative proposal of March 2014 contains an additional one hundred articles, similar in number to and yet different from the ECJ's recent recast of its own rules of procedure. It is safe to assume that the said proposal will be adopted and come into force in 2015.

I have little doubt that the present doctoral program will influence the way in which I will reflect on these arguments and possibly also the spirit of future publications. In the world of publications on EU subjects, in particular with respect to judicial themes, there is probably not a broad margin for thoughts derived from other disciplines, except perhaps for some historical and political arguments. But the present program has opened new horizons and this will undoubtedly accompany me when undertaking future publishing.

#### **Teaching**

The completion of the doctorate will become the starting point of a project which I have had for a number of years now, but which the work on the successive commentaries kept relegating to a lower position on the priority list. For many years now EU law has been part of the curriculum of quite a number of law faculties and institutes. Courses and lectures usually cover all the main areas of EU law, such as the four fundamental freedoms and competition law, but also more specific areas, such as fundamental rights and environmental and

social law. The curriculum of my LLM program in EU law covered “legal remedies,” which is an important part of the EU judicial system. There is of course no objective justification, nor presumably any tangible demand, for lectures that would focus on the full spectrum of litigation at the EU courts, both from a theoretical and practical perspective. This ‘no objective justification for’ view is obvious for the undergraduate level, and certainly also true for post-graduate programs. In addition, from a personal perspective, being a regular lecturer would hardly be compatible with my professional constraints.

That said, considering whether there is room for e.g. a seminar or a colloquium series for postgraduate students with a special interest in litigation at the EU courts deserves to be explored. This may be the case provided that such a course would cover a much broader, if not the full spectrum of instruments that are at the disposal of individuals or companies for defending their interests vis-à-vis the EU, since litigation is merely the *ultima ratio* of conflict resolution. These other instruments provide important opportunities and yet remain little known:

Firstly, EU law<sup>83</sup> guarantees the public the right to gain access to EU documents, which serves the purpose of transparency. Access to EU documents may be vital for litigation or for defending individual economic or political interests vis-à-vis EU institutions or a Member State. But it may also be a precious source of information for NGOs, journalists, and doctoral students. The GC’s abundant case law illustrates both the variety of individuals and organizations for which the issue of public access is potentially relevant and the complexity of drawing exact lines between the principle of access and the various exceptions to this principle provided in Regulation 1049/2001 (Wägenbaur, 2001). This issue is further complicated by the fact that some institutions, such as the ECB, have their own rules on public access, which became relevant in a Court case I pleaded for the ECB itself<sup>84</sup>.

Secondly, every citizen has the right to complain to the European Commission about a Member State infringing EU law through national legislation and/or

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<sup>83</sup> Article 15 TFEU and its implementation by Council Regulation no. 1049/2001

<sup>84</sup> Case F-26/12, *Cerafogli v ECB* [2014], currently under appeal

administrative practice. The plaintiff may use an optional complaint form to be found on the Commission's website. There is also no legal obligation to be represented by a lawyer, which means that the complaint may be brief. As a result, the Commission will ideally initiate infringement proceedings against the Member State concerned and, in case of persistent infringement of EU law, take that Member State to Court. Should the ECJ find that the Member State did breach EU law, and additionally finds that this breach is grave, the plaintiffs who suffered a prejudice may then claim damages from that Member State in proceedings before a national Court.

Thirdly, a further tool any individual may use without having to embark on any particular and potentially costly procedure is to convince a member of the European Parliament to submit a written question to the European Commission on any given EU matter. This instrument is another important means of fact finding at the disposal of a broad variety of individuals and organizations and can prove to be a very efficient alternative to litigation, as illustrated by my personal experience, many years ago:

The French subsidiary of a multinational company claimed refund of a very substantial amount of VAT that it had paid over several years for advertising services. The French fiscal authorities flatly refused this refund. The company took the State to Court, knowing that these proceedings were bound to take years and that the outcome would be uncertain. The parent company's finance director then called me to first let me know what he thought of lawyers in general – and I must say he was quite right – and then to simply say: “Do something with the Commission.” And so I did. I rather quickly managed to convince a member of the European Parliament that the French court proceedings included a question concerning the term “fiscal unit” as defined by the sixth VAT Directive of the EU. I persuaded this parliamentarian that this question was of general interest and thus deserved to be submitted to the European Commission. The Commission's written reply was exactly what I had been hoping for and provided *the* basis for making it very clear to the French fiscal authorities that any further refusal of refund was putting France at a clear risk of infringement proceedings by the Commission. After some months of complete silence my client received a simple letter from the said



fiscal authorities merely indicating the words “*restitution d’office*” (ex officio reimbursement), and the amount, i.e. a seven-digit figure, with no further explanation. Compared to a court case my input was relatively small, but the result was significant and expedited quickly or ‘was big and came fast’, in the words of the company’s finance director.

Fourthly, EU citizens have the right to complain to the European Ombudsman in case of maladministration by an EU institution, and to OLAF, the EU’s financial watchdog, against any individual or company involved in fraud or to report other financial irregularities which harm the EU budget. In my view, these various instruments, when considered along with judicial protection at the EU courts, lend themselves as a subject for a seminar for students since they illustrate that EU citizens have many remedies available than just litigation.

Good teaching is fundamentally the art of distilling and translating information without bias, to see understanding not as something arrived at through process but by creating the conditions for understanding to take place (Bruns, 1992). This translates very well the spirit which I believe to have applied or transposed to my work so far, be it as a litigator, as an author of publications or as a guest speaker, e.g. at the 58<sup>th</sup> Annual National Conference of German Lawyers in 2007.

## SECTION 7

### Concluding remarks

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The overall purpose of this context statement, i.e. to critically assess my own public works, has been a challenging and unique experience for me. I may have contemplated the idea from time to time but always managed to ignore standing back and looking at my own outputs from a range of perspectives. This might have been a symptom of how anyone can be caught up in a tunnel view, although I remain convinced that I am only a mild case.

This context statement has highlighted the value of reflecting on the role of non-legal arguments drawn from other disciplines when discussing legal aspects. I would actually say that I would never again be able to see legal issues from a purely legal perspective. This has renewed my respect for the opinions of others that are not criticism but critique that can help to develop arguments and ignite new thinking and creativity leading to new projects. Such critiques add to my box of motivational tools that, as I have stated earlier, include attitude and commitment to cultural openness and ongoing learning.

In contrast to other types of publications, a context statement is unlikely to be a recurrent exercise. This is regrettable in a way, as it is such a non-conventional experience. But the mind-broadening effect of the context statement will certainly accompany me throughout my professional and personal life.

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## APPENDICES

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**Appendix 1:** List of cases pleaded at the ECJ, CFI/GC, CST and ATILO

**Appendix 2:** List of my books, contributions to books and articles in legal journals; copy of cover of my German commentary and full copy of my articles referred to in the context statement

**Appendix 3:** Book reviews regarding my German commentary

**Appendix 4:** Examples of Monographs on the EU judiciary and the rules of procedure of EU Courts

**Appendix 5:** Number of copies of the English and German commentary purchased by the ECJ's library

**Appendix 6:** Request of the CST of 17 September 2012 regarding proposals on new rules of procedure and reply of 12 November 2012

**Appendix 7:** Book reviews regarding English commentary

**Appendix 8:** Examples of articles regarding the EU judiciary

**Appendix 9:** List of Opinions of Advocates General quoting my German commentary

**Appendix 10:** Statistics regarding the languages of the procedure in proceedings at the ECJ, the GC and the CST between 2009 and 2013

**Appendix 11:** List of ECJ orders rejecting as inadmissible referrals for preliminary rulings in 2013 and 2014

**Appendix 12:** List of GC orders rejecting applications for legal aid due to manifest lack of jurisdiction